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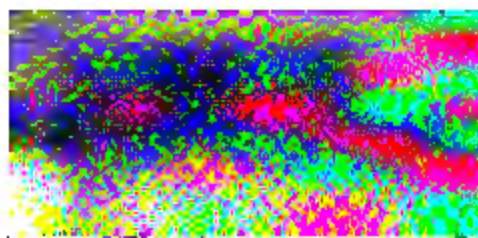
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RAILROAD REPORTS

(Vol 39 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

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TABLE OF CASES.

Abbott <i>v.</i> Oregon R. Co. (Ore.).....	52
Adams, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.).....	843
Adger <i>v.</i> Blue Ridge Ry. Co. (S. Car.).....	83
Aldredge & Shelton, Southern Ry. Co. <i>v.</i> (Ala.).....	519
American Express Co. <i>v.</i> Jennings (Miss.).....	546
Andrews <i>v.</i> Yazoo & M. V. R. Co (Miss.).....	587
Ann Arbor R. Co., Weaver <i>v.</i> (Mich.).....	603
Atlantic & B. R. Co., Meeks <i>v.</i> (Ga.).....	672
Augusta Brokerage Co., Central of Georgia Ry. Co. <i>v.</i> (Ga.)....	634
Ayers <i>v.</i> Wabash R. Co. (Mo.).....	470
Bachant <i>v.</i> Boston & M. R. R. (Mass.).....	677
Baltimore & O. R. Co. <i>v.</i> Hubbard (Ohio).....	71
Baltimore & O. R. Co., Sheridan <i>v.</i> (Md.).....	766
Baltimore & O. R. Co. <i>v.</i> State, to Use of Logsdon (Md.).....	399
Birmingham Ry., Light & Power Co. <i>v.</i> Willis (Ala.).....	523
Birmingham Southern Ry. Co. <i>v.</i> Lintner (Ala.).....	225
Blue Ridge Ry. Co., Adger <i>v.</i> (S. Car.).....	83
Borneman <i>v.</i> Chicago, St. P., M. & O. Ry. Co. (S. Dak.).....	464
Boston Elevated Ry. Co., Downey <i>v.</i> (Mass.).....	864
Boston Elevated Ry. Co., McGee <i>v.</i> (Mass.).....	864
Boston Elevated Ry. Co., McNeill <i>v.</i> (Mass.).....	864
Boston Elevated Ry. Co., Willworth <i>v.</i> (Mass.).....	69
Boston Elevated Ry. Co., Wood <i>v.</i> (Mass.).....	475
Boston & H. Dispatch Co., Bullock <i>v.</i> (Mass.).....	594
Boston & M. R. R., Bachant <i>v.</i> (Miss.).....	677
Boston & M. R. R., Laronde <i>v.</i> (N. H.).....	223
Boston & M. R. R., Taylor <i>v.</i> (Mass.).....	397
Bowen <i>v.</i> Illinois Cent. R. Co. (C. C. A.).....	269
Bridges <i>v.</i> Jackson Electric Ry., Light & Power Co. (Miss.)....	512
Brown, Prescott & N. W. Ry. Co. <i>v.</i> (Ark.).....	132
Bugbee <i>v.</i> Union R. Co. (R. I.).....	128
Bullock <i>v.</i> Boston & H. Dispatch Co. (Mass.).....	594
Burlington, C. R. & N. Ry. Co., Struble <i>v.</i> (Iowa).....	259
Burlington & N. W. Ry. Co., Fishburn <i>v.</i> (Iowa).....	444
Buskirk, Guyandotte Valley Ry. Co. <i>v.</i> (W. Va.).....	317
Camden & Suburban Ry. Co., Hollingsead <i>v.</i> (N. J.),.....	797
Carbon Hill Coal Co., Demko <i>v.</i> (C. C. A.).....	232
Carlisle, St. Louis & S. F. Ry. Co. <i>v.</i> (Ark.).....	462
Carroll, Southern Ry. Co. <i>v.</i> (C. C. A.).....	488
Central of Georgia Ry. Co. <i>v.</i> Augusta Brokerage Co. (Ga.)....	634
Central Vermont R. Co., Osgood <i>v.</i> (Vt.).....	699
Chesapeake & O. Ry. Co., Wilson's Adm'rs <i>v.</i> (Ky.).....	103
Chicago & A. R. Co., Raisor <i>v.</i> (Ill.).....	96
Chicago Great Western Ry. Co., Parrott <i>v.</i> (Iowa).....	253
Chicago, I. & L. Ry. Co. <i>v.</i> Reyman (Ind.).....	674
Chicago & M. Electric R. Co. <i>v.</i> Diver (Ill.).....	346
Chicago, M. & St. P. Ry. Co., Titus <i>v.</i> (Iowa).....	129
Chicago & N. W. Ry. Co., German Ins. Co. of Freeport <i>v.</i> (Iowa)	494
Chicago, R. I. & P. Ry. Co., Clemans <i>v.</i> (Iowa).....	413
Chicago, R. I. & P. Ry. Co., O'Leary <i>v.</i> (Iowa).....	141
Chicago, St. L. & N. O. R. Co. <i>v.</i> Rottgering (Ky.).....	340
Chicago, St. P., M. & O. Ry. Co. <i>v.</i> Borneman (S. Dak.).....	464
Chicago Terminal Transfer R. Co. <i>v.</i> Walton (Ind.).....	456
Chicago Union Traction Co. <i>v.</i> Leach (Ill.).....	220
Chicago Union Traction Co. <i>v.</i> Lundahl (Ill.).....	15
Choctaw, O. & G. R. Co., Crutcher <i>v.</i> (Ark.).....	661

Choctaw, O. & G. Ry. Co. <i>v.</i> Rolfe (Ark.).....	525
Choctaw, O. & G. Ry. Co. <i>v.</i> State (Ark.).....	544
Christensen <i>v.</i> Oregon Short Line R. Co. (Utah).....	121
City of Waterbury, Naugatuck R. Co. <i>v.</i> (Conn.).....	314
Clark <i>v.</i> Great Northern Ry. Co. (Wash.).....	860
Clemans <i>v.</i> Chicago, R. I. & P. Ry. Co. (Iowa).....	413
Coffee <i>v.</i> Pere Marquette R. Co. (Mich.).....	772
Coleman <i>v.</i> Southern Ry. Co. (N. Car.).....	32
Commonwealth <i>v.</i> Louisville & N. R. Co. (Ky.).....	91
Conneally, Los Angeles Traction Co. <i>v.</i> (Wis.).....	107
Conroy <i>v.</i> Detroit United Ry. (Mich.).....	671
Coombs, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.).....	480
Coutourie, Texas & P. Ry. Co. <i>v.</i> (C. C. A.).....	642
Crutcher <i>v.</i> Choctaw O. & G. R. Co. (Ark.).....	661
Dalin <i>v.</i> Worcester Consol. St. Ry. Co. (Mass.).....	476
Daly Bank & Trust Co. of Butte <i>v.</i> Great Falls St. Ry. Co. (Mont.) ..	692
Dean <i>v.</i> Oregon R. & Nav. Co. (Wash.).....	237
Dean, Texas Midland R. R. <i>v.</i> (Tex.).....	596
Delaware, L. & W. R. Co., Schwarz <i>v.</i> (Pa.).....	441
Demko <i>v.</i> Carbon Hill Coal Co. (C. C. A.).....	232
Denver & R. G. R. Co. <i>v.</i> Maydole (Colo.).....	762
Detroit & M. Ry. Co., Johnson <i>v.</i> (Mich.).....	828
Detroit Ry., Selby <i>v.</i> (Mich.).....	583
Detroit United Ry., Conroy <i>v.</i> (Mich.).....	671
Detroit United Ry. Co., Walters <i>v.</i> (Mich.).....	658
Devers, Philadelphia, B. & W. R. Co. <i>v.</i> (Md.).....	366
Dittenhoefer, Williams & Pearson <i>v.</i> (Mo.).....	723
Diver, Chicago & M. Electric R. Co. <i>v.</i> (Ill.).....	346
Downey <i>v.</i> Boston Elevated Ry. Co. (Mass.).....	864
Dunn <i>v.</i> Oregon Short Line R. Co. (Utah.).....	741
Easterbrook, Illinois, I. & M. Ry. Co. <i>v.</i> (Ill.).....	337
Elliott, Illinois Cent. R. Co. <i>v.</i> (Ky.).....	145
Ellis, Gulf & S. I. R. Co. <i>v.</i> (Miss.).....	817
Erie R. Co., Farrell <i>v.</i> (C. C. A.).....	485
Erie R. Co., Rosney <i>v.</i> (C. C. A.).....	751
Evans, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.).....	788
Fagan <i>v.</i> Rhode Island Co. (R. I.).....	22
Farrell <i>v.</i> Erie R. Co. (C. C. A.).....	485
Fenstermaker, Toledo St. L. & W. R. Co. <i>v.</i> (Ind.).....	855
Fireman's Ins. Co. <i>v.</i> Seaboard Air Line Ry. (N. Car.).....	808
Fishburn <i>v.</i> Burlington & N. W. Ry. Co. (Iowa).....	444
Fitchburg R. R., Hilton <i>v.</i> (N. H.).....	757
Flake, Nashville, C. & St. L. Ry. Co. <i>v.</i> (Tenn.).....	552
Fordyce, Smith <i>v.</i> (Mo.).....	378
Freeman, Illinois, I. & M. Ry. Co. <i>v.</i> (Ill.).....	360
Georgia Ry. & Electric Co., Walker <i>v.</i> (Ga.).....	654
Georgia Ry. & Electric Co. <i>v.</i> Wallace & Co. (Ga.).....	793
German Ins. Co. of Freeport <i>v.</i> Chicago & N. W. Ry. Co. (Iowa).....	494
Gila Valley G. & N. Ry. Co. <i>v.</i> Lyon (Ariz.).....	745
Gloyd, Southern Pac. Co. <i>v.</i> (C. C. A.).....	408
Gorham Mfg. Co. <i>v.</i> New York, N. H. & H. R. Co. (R. I.).....	216
Graham & Ward <i>v.</i> Macon, D. & S. R. Co. (Ga.).....	47
Grand Trunk Western Ry. Co., Minahan <i>v.</i> (C. C. A.).....	562
Great Falls St. Ry. Co., Daly Bank & Trust Co. <i>v.</i> (Mont.)....	692
Great Northern Ry. Co., Clark <i>v.</i> (Wash.).....	860
Green Bay & W. R. Co., Marshall <i>v.</i> (Wis.).....	138
Gulf & S. I. R. Co. <i>v.</i> Ellis (Miss.).....	817
Guyandotte Valley Ry. Co. <i>v.</i> Buskirk (W. Va.).....	317
Hancock <i>v.</i> Louisville & N. R. Co. (Ky.).....	612
Harbison, Texas Cent. R. Co. <i>v.</i> (Tex.).....	770
Harrisburg Traction Co., Redington <i>v.</i> (Pa.).....	600
Hart <i>v.</i> State (Md.).....	622
Harvey <i>v.</i> Louisiana Western R. Co. (La.).....	573

Hatch v. Philadelphia & R. Ry. Co. (Pa.).....	586
Highnote, St. Louis Southwestern Ry. Co. of Texas v. (Tex.)....	41
Hilton v. Fitchburg R. R. (N. H.).....	757
Hollingsead v. Camden & Suburban Ry. Co. (N. J.).....	797
Holmes, Santa Fe Pac. R. Co. v. (C. C. A.).....	248
Hubbard, Baltimore & O. R. Co. v. (Ohio).....	71
Hull v. Northern Pac. Ry. Co. (C. C. A.).....	265
Illinois Central R. Co., Bowen v. (C. C. A.).....	269
Illinois Central R. Co. v. Elliott (Ky.).....	145
Illinois Central R. Co., Lennon v. (Iowa).....	45
Illinois Central R. Co. v. Seitz (Ill.).....	684
Illinois Cent. R. Co. v. Stith's Adm'x (Ky.).....	729
Illinois, I. & M. Ry. Co. v. Easterbrook (Ill.).....	337
Illinois, I. & M. Ry. Co. v. Freeman (Ill.).....	360
Illinois Terminal R. Co. v. Mitchell (Ill.).....	835
Jackson Electric Ry., Light & Power Co., Bridges v. (Miss.)....	512
Jennings, American Express Co. v. (Miss.).....	546
Johnson v. Detroit & M. Ry. Co. (Mich.).....	828
Johnson, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	775
Kansas City Ft. S. & M. R. Co. v. Washington (Ark.).....	663
Kansas City Southern Ry. Co. v. Murphy (Ark.).....	416
Kiersey, San Antonio & A. P. Ry. Co. v. (Tex.).....	10
Kimberlain, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	479
Knoxville, L. F. & J. R. Co., Wray v. (Tenn.).....	329
Kroeger v. Seattle Electric Co. (Wash.).....	689
Lake Shore, etc., Ry. Co., United States ex rel Knapp v. (U. S.)..	93
Lake Superior Terminal & Transfer Ry. Co., Morey v. (Wis.)..	113
Laronde v. Boston & M. R. R. (N. H.).....	223
Leach, Chicago Union Traction Co. v. (Ill.).....	220
Lennon v. Illinois Central R. Co. (Iowa).....	45
Lindell Ry. Co., St. Louis & S. Ry. Co. v. (Mo.).....	281
Lintner, Birmingham Southern Ry. Co. v. (Ala.).....	225
Little Rock & H. S. W. Ry. Co. v. Records (Ark.).....	664
Logan, Southern Ry. Co. v. (C. C. A.).....	374
Lorain Steel Co. v. Norfolk & B. St. Ry. Co. (Mass.).....	718
Los Angeles Traction Co. v. Conneally (C. C. A.).....	107
Louisiana Western R. Co., Harvey v. (La.).....	573
Louisville & N. R. Co., Commonwealth v. (Ky.).....	91
Louisville & N. R. Co., Hancock v. (Ky.).....	612
Louisville & N. R. Co., Merschel v. (Ky.).....	829
Louisville & N. R. Co. v. Sawyer (Tenn.).....	800
Lundahl, Chicago Union Traction Co. v. (Ill.).....	15
Lyon, Gila Valley G. & N. Ry. Co. v. (Ariz.).....	745
McFall, St. Louis, & S. F. R. Co. v. (Ark.).....	243
McGee v. Boston Elevated Ry. Co. (Mass.).....	864
McKenzie, Pine Bluff & A. R. Ry. Co. v. (Ark.).....	50
McLean v. Omaha & C. B. Ry. & Bridge Co. (Neb.).....	119
McNeill v. Boston Elevated Ry. Co. (Mass.).....	864
Macon, D. & S. R. Co., Graham & Ward v. (Ga.).....	47
Maloney, Southern Pac. Co. v. (C. C. A.).....	29
Markowitz v. Metropolitan St. R. Co. (Mo.).....	828
Marshall v. Green Bay & W. R. Co. (Wis.).....	128
Mattson v. Minnesota & N. W. R. Co. (Minn.).....	502
Marshall, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	38
Maydole, Denver & R. G. R. Co. v. (Colo.).....	762
Maysville & B. S. R. Co., Willis v. (Ky.).....	822
Meeks v. Atlantic & B. R. Co. (Ga.).....	672
Merschel v. Louisville & N. R. Co. (Ky.).....	829
Metropolitan St. R. Co., Markowitz v. (Mo.).....	828
Miller v. St. Charles St. R. Co. (La.).....	469
Minahan v. Grand Trunk Western Ry. Co. (C. C. A.).....	569
Minneapolis & St. L. R. Co., Steidl v. (Minn.).....	668
Minneapolis, St. P. & S. S. M. Ry. Co., Wickenburg v. (Minn.)..	891
Minnesota & N. W. R. Co., Mattson v. (Minn.).....	502

Missouri, K. & T. Ry. Co., Patrick <i>v.</i> (Ind. Ter.).....	554
Missouri Pac. Ry. Co., Walter <i>v.</i> (Kan.).....	681
Mitchell, Illinois Terminal R. Co. <i>v.</i> (Ill.).....	835
Montgomery St. Ry. <i>v.</i> Rice (Ala.).....	499
Moore <i>v.</i> St. Louis, I. M. & S. Ry. Co. (La.).....	370
Morgan's L. & T. R. & S. S. Co., Pharr <i>v.</i> (La.).....	434
Morey <i>v.</i> Lake Superior Terminal & Transfer Ry. Co. (Wis.)....	113
Moss, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.).....	66
Mullin <i>v.</i> Northern Pac. Ry. Co. (Wash.).....	234
Murphy, Kansas City Southern Ry. Co. <i>v.</i> (Ark.).....	416
Nashville, C. & St. L. Ry. Co. <i>v.</i> Flake (Tenn.).....	552
Naugatuck R. Co. <i>v.</i> City of Waterbury (Conn.).....	314
New Orleans & N. W. R. Co., Shamblin <i>v.</i> (La.).....	528
New York, N. H. & H. R. Co., Gorham Mfg. Co. <i>v.</i> (R. I.).....	216
New York, N. H. & H. R. Co. <i>v.</i> Offield (Conn.).....	312
Norfolk & B. St. Ry. Co., Lorain Steel Co. <i>v.</i> (Mass.).....	718
North Carolina R. Co., Stewart <i>v.</i> (N. Car.).....	212
Northern Cent. Ry. Co. <i>v.</i> State to Use of Gilmore (Md.).....	818
Northern Pac. Ry. Co., Hull <i>v.</i> (C. C. A.).....	265
Northern Pac. Ry. Co., Mullin <i>v.</i> (Wash.).....	234
Northern Pac. Ry. Co., Orient Ins. Co. <i>v.</i> (Mont.).....	207
Offield, New York, N. H. & H. R. Co. <i>v.</i> (Conn.).....	312
O'Leary <i>v.</i> Chicago, R. I. & P. Ry. Co. (Iowa).....	141
Omaha & C. B. Ry. & Bridge Co., McLean <i>v.</i> (Neb.).....	119
Oregon R. Co., Abbott <i>v.</i> (Ore.).....	52
Oregon R. & Nav. Co., Dean <i>v.</i> (Wash.).....	237
Oregon Short Line R. Co., Christensen <i>v.</i> (Utah).....	121
Oregon Short Line R. Co., Dunn <i>v.</i> (Utah).....	741
Oregon Short Line R. Co. <i>v.</i> Quigley (Idaho).....	1
Orient Ins. Co. <i>v.</i> Northern Pac. Ry. Co. (Mont.).....	207
Osgood <i>v.</i> Central Vermont R. Co. (Vt.).....	699
Parrott <i>v.</i> Chicago Great Western Ry. Co. (Iowa).....	253
Patrick <i>v.</i> Missouri, K. & T. Ry. Co. (Ind. Ter.).....	554
Pennsylvania R. Co., Pollack <i>v.</i> (Pa.).....	764
Pere Marquette R. Co., Coffee <i>v.</i> (Mich.).....	772
Pere Marquette R. Co., Village of Plymouth <i>v.</i> (Mich.).....	707
Pharr <i>v.</i> Morgan's L. & T. R. & S. S. Co. (La.).....	434
Philadelphia, B. & W. R. Co. <i>v.</i> Devers (Md.).....	366
Philadelphia & R. Ry. Co., Hatch <i>v.</i> (Pa.).....	586
Pine Bluff & A. R. Ry. Co. <i>v.</i> McKenzie (Ark.).....	50
Pope, St. Louis Southwestern Ry. Co. of Texas <i>v.</i> (Tex.).....	736
Pollack <i>v.</i> Pennsylvania R. Co. (Pa.).....	764
Prescott & N. W. Ry. Co. <i>v.</i> Brown (Ark.).....	132
Price <i>v.</i> St. Louis, I. M. & S. Ry. Co. (Ark.).....	534
Purcell, St. Louis Southwestern Ry. Co. <i>v.</i> (C. C. A.).....	779
Quigley, Oregon Short Line R. Co. <i>v.</i> (Idaho).....	1
Rainey, Seaboard Air Line Ry. <i>v.</i> (Ga.).....	655
Raisor <i>v.</i> Chicago & A. R. Co. (Ill.).....	96
Rapp <i>v.</i> St. Louis Transit Co. (Mo.).....	419
Records, Little Rock & H. S. W. Ry. Co. <i>v.</i> (Ark.).....	664
Redington <i>v.</i> Harrisburg Traction Co. (Pa.).....	600
Reed, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.).....	541
Reyman, Chicago I. & L. Ry. Co. <i>v.</i> (Ind.).....	674
Rhode Island Co., Fagan <i>v.</i> (R. I.).....	22
Rice, Montgomery St. Ry. <i>v.</i> (Ala.).....	499
Richmond & P. Electric Ry. Co. <i>v.</i> Seaboard Air Line Ry. (Va.)..	354
Riley <i>v.</i> Shreveport Traction Co. (La.).....	785
Rolfe, Choctaw, O. & G. Ry. Co. <i>v.</i> (Ark.).....	525
Rosney <i>v.</i> Erie R. Co. (C. C. A.).....	751
Rottgering, Chicago, St. L. & N. O. R. Co. <i>v.</i> (Ky.).....	340
Royall, St. Louis Southwestern Ry. Co. <i>v.</i> (Ark.).....	309
St. Charles St. R. Co., Miller <i>v.</i> (La.).....	460
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Adams (Ark.).....	843
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Coombs (Ark.).....	480

St. Louis, I. M. & S. Ry. Co. <i>v.</i> Johnson (Ark.).....	775
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Evans (Ark.).....	788
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Kimberlain (Ark.).....	479
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Marshall (Ark.).....	38
St. Louis, I. M. & S. Ry. Co., Moore <i>v.</i> (La.).....	370
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Moss (Ark.).....	66
St. Louis, I. M. & S. Ry. Co., Price <i>v.</i> (Ark.).....	534
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Reed (Ark.).....	541
St. Louis & S. F. Ry. Co. <i>v.</i> Carlisle (Ark.).....	462
St. Louis & S. F. Ry. Co. <i>v.</i> McFall (Ark.).....	243
St. Louis & S. Ry. Co. <i>v.</i> Lindell Ry. Co. (Mo.).....	281
St. Louis Southwestern Ry. Co. <i>v.</i> Purcell (C. C. A.).....	779
St. Louis Southwestern Ry. Co. <i>v.</i> Royall (Ark.).....	309
St. Louis Southwestern Ry. Co. <i>v.</i> Stringer (Ark.).....	815
St. Louis Southwestern Ry. Co. <i>v.</i> Underwood (Ark.).....	134
St. Louis Southwestern Ry. Co. of Texas <i>v.</i> Highnote (Tex.)....	41
St. Louis Southwestern Ry. Co. of Texas <i>v.</i> Pope (Tex.).....	736
St. Louis Transit Co., Sluder <i>v.</i> (Mo.).....	293
St. Louis Transit Co., Rapp <i>v.</i> (Mo.).....	419
San Antonio & A. P. Ry. Co. <i>v.</i> Kiersey (Tex.).....	10
San Francisco Sav. Union, Southern Pac. R. Co. <i>v.</i> (Cal.).....	709
Santa Fe Pac. R. Co. <i>v.</i> Holmes (C. C. A.).....	248
Sawyer, Louisville & N. R. Co. <i>v.</i> (Tenn.).....	800
Schwarz <i>v.</i> Delaware, L. & W. R. Co. (Pa.).....	441
Seaboard Air Line Ry., Fireman's Ins. Co. <i>v.</i> (N. Car.).....	808
Seaboard Air Line Ry. <i>v.</i> Rainey (Ga.).....	655
Seaboard Air Line Ry., Richmond & P. Electric Ry. Co. <i>v.</i> (Va.)..	354
Seattle Electric Co., Kroeger <i>v.</i> (Wash.).....	689
Seitz, Illinois Cent. R. Co. <i>v.</i> (Ill.).....	684
Selby <i>v.</i> Detroit Ry. (Mich.).....	583
Shamblin <i>v.</i> New Orleans & N. W. R. Co. (La.).....	528
Sheridan <i>v.</i> Baltimore & O. R. Co. (Md.).....	766
Shreveport Traction Co., Riley <i>v.</i> (La.).....	785
Sluder <i>v.</i> St. Louis Transit Co. (Mo.).....	293
Smith <i>v.</i> Fordyce (Mo.).....	378
Smith, South Covington & C. St. Ry. Co. <i>v.</i> (Ky.).....	26
South Covington & C. St. Ry. Co. <i>v.</i> Smith (Ky.).....	26
Southern Pac. Co. <i>v.</i> Gloyd (C. C. A.).....	408
Southern Pac. Co. <i>v.</i> Maloney (C. C. A.).....	29
Southern Pac. R. Co. <i>v.</i> San Francisco Sav. Union (Cal.).....	709
Southern Ry. Co. <i>v.</i> Aldredge & Shelton (Ala.).....	519
Southern Ry. Co. <i>v.</i> Carroll (C. C. A.).....	488
Southern Ry. Co., Coleman <i>v.</i> (N. Car.).....	32
Southern Ry. Co. <i>v.</i> Logan (C. C. A.).....	374
Southern Ry. Co. <i>v.</i> Williams (Ala.).....	429
State, Choctaw, O. & G. R. Co. <i>v.</i> (Ark.).....	544
State, Hart <i>v.</i> (Md.).....	622
State ex rel. Sheets, Atty. Gen. <i>v.</i> Union Depot Co. (Ohio).....	614
State, to Use of Gilmore, Northern Cent. Ry. Co. <i>v.</i> (Md.).....	818
State, to Use of Logsdon, Baltimore & O. R. Co. <i>v.</i> (Md.).....	399
Steidl <i>v.</i> Minneapolis & St. L. R. Co. (Minn.).....	668
Stewart <i>v.</i> North Carolina R. Co. (N. Car.).....	212
Stith's Adm'x. Illinois Central R. Co. <i>v.</i> (Ky.).....	729
Stringer, St. Louis Southwestern Ry. Co. <i>v.</i> (Ark.).....	815
Struble <i>v.</i> Burlington, C. R. & N. Ry. Co. (Iowa).....	259
Taylor <i>v.</i> Boston & M. R. R. (Mass.).....	397
Texas Cent. R. Co. <i>v.</i> Harbison (Tex.).....	770
Texas Midland R. R. <i>v.</i> Dean (Tex.).....	596
Texas & P. Ry. Co. <i>v.</i> Coutourie (C. C. A.).....	642
Titus <i>v.</i> Chicago, M. & St. P. Ry. Co. (Iowa).....	129
Toledo, St. L. & W. R. Co. <i>v.</i> Fenstermaker (Ind.).....	855
Underwood, St. Louis, Southwestern Ry. Co. <i>v.</i> (Ark.).....	134
Union Depot Co., State ex rel. Sheets, Atty. Gen. <i>v.</i> (Ohio).....	614
Union R. Co., Bugbee <i>v.</i> (R. I.).....	128

United State ex rel. Knapp <i>v.</i> Lake Shore, etc., Ry. Co. (U. S.)..	93
Vicksburg, S. & P. Ry., Willis <i>v.</i> (La.).....	590
Village of Plymouth <i>v.</i> Pere Marquette R. Co. (Mich.).....	707
Wabash R. Co., Ayers <i>v.</i> (Mo.).....	470
Walker <i>v.</i> Georgia Ry. & Electric Co. (Ga.).....	654
Wallace & Co., Georgia Ry. & Electric Co. <i>v.</i> (Ga.).....	793
Walter <i>v.</i> Missouri Pac. Ry. Co. (Kan.).....	681
Walters <i>v.</i> Detroit United Ry. Co. (Mich.).....	658
Walton, Chicago Terminal Transfer R. Co. <i>v.</i> (Ind.).....	456
Washington, Kansas City Ft. S. & M. R. Co. <i>v.</i> (Ark.).....	663
Washington Ry. & Nav. Co., Woolf <i>v.</i> (Wash.).....	846
Williams, Southern Ry. Co. <i>v.</i> (Ala.).....	429
Willis, Birmingham Ry., Light & Power Co. <i>v.</i> (Ala.).....	523
Weaver <i>v.</i> Ann Arbor R. Co. (Mich.).....	603
Wickenburg <i>v.</i> Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.)....	824
Williams & Pearson <i>v.</i> Dittenhoefer (Mo.).....	723
Willis <i>v.</i> Maysville & B. S. R. Co. (Ky.).....	832
Willis <i>v.</i> Vicksburg, S. & P. Ry. (La.).....	590
Willworth <i>v.</i> Boston Elevated Ry. Co. (Mass.).....	69
Wilson's Adm'rs <i>v.</i> Chesapeake & O. Ry. Co. (Ky.).....	103
Wood <i>v.</i> Boston Elevated Ry. Co. (Mass.).....	475
Woolf <i>v.</i> Washington Ry. & Nav. Co. (Wash.).....	846
Worcester Consol. St. Ry. Co., Dalin <i>v.</i> (Mass.).....	476
Worcester Con. St. Ry. Co., Worcester <i>v.</i> (U. S.).....	286
Worcester <i>v.</i> Worcester Con. St. Ry. Co. (U. S.).....	286
Wray <i>v.</i> Knoxville, L. F. & J. R. Co. (Tenn.).....	329
Yazoo & M. V. R. Co., Andrews <i>v.</i> (Miss.).....	587

RAILROAD REPORTS

OREGON SHORT LINE R. CO. *v.* QUIGLEY *et al.*

(Supreme Court of Idaho, March 15, 1905.)

[80 Pac. Rep. 401.]

Public Land—Congressional Power.—The power of Congress over the public lands is plenary so long as title thereto remains in the government and no right of property therein has vested in another.

Same—Title of Settler.—No right of property, as against the government, vests in a settler on public lands until he has complied with all the prerequisites for acquiring title and paid the purchase money.

Same—Railroad Right of Way—When Grant Vests.—Act Cong. March 3, 1873, c. 291, 17 Stat. 612, granting a right of way to the Utah & Northern Railway Company, and requiring the filing of a map of definite location with the Secretary of the Interior, is substantially complied with, so far as settlers are concerned, by the actual construction and operation of the road.

Same—Same—Same.—The grant for right of way became definitely fixed by the actual construction of the road as effectually as it could have been by the filing of a map of location.

Same—Same—Scope of Grant.—The grant by Congress of a right of way 100 feet wide on each side of the central line of the track was a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use, and carried with it the right of possession to the whole of such grant.

Estoppel.—As a general rule of law, the grantee named in a deed of conveyance is not estopped to deny the title of his grantor.

Same.—The estoppel exists only where there is an obligation to restore the possession in some event or upon some contingency.

Public Lands—Right of Way—Interest Granted.*—The grant by Congress of a right of way is not an absolute fee for all purposes,

*For the authorities in this series on the subject of federal grants of public lands to railroad companies, see foot-note appended to *United States v. St. Anthony R. Co.* (U. S.), 10 R. R. R. 346, 33 Am. & Eng. R. Cas., N. S., 346 (right of railroad companies to cut timber on adjacent lands); *United States v. Denver & R. G. R. Co.* (U. S.), 10 R. R. R. 422, 33 Am. & Eng. R. Cas., N. S., 422 (burden of proof on lumber company acting as agent for railroad in cutting timber from public domain, where the company relies on the federal statute conferring right to cut such timber); *Oregon & California Railroad v. United States* (C. C. A.), 7 R. R. R. 943, 30 Am. & Eng. R. Cas., N. S., 943 (effect of delay in making survey upon rights of settler occupying lands within indemnity limits of grants, in advance of their selection by railroad company to supply deficiency in place of limits, under Act of May 4, 1870, ch. 69; *Southern Pac. Railroad v. United States* (U. S.), 8 R. R. R. 837, 31 Am. & Eng. R. Cas., N. S., 837 (indemnity selections, construction of federal statute); *Nelson v. Northern Pac. Ry. Co.* (U. S.), 7 R. R. R. 367, 30 Am. & Eng. R. Cas., N. S., 367 (land within exterior limits within meaning of Act of Congress of May 14, 1880, ch. 89, § 3); *Northern Pac. Ry. Co. v. Soderberg* (U. S.), 7 R. R. R. 911, 30 Am. & Eng. R. Cas., N. S., 911 (mineral lands, what are); *San Jose Land & Water Co. v. San Jose Ranch Co.* (U. S.), 6 R. R. R. 824, 29 Am. & Eng. R. Cas., N. S., 824 (rights of subsequent grantees to forfeited land); *Clark v. Herington*

Oregon Short Line R. Co. v. Quigley

but is in the nature of a conditional grant, and limited to use and occupation for railway purposes. The franchise and right of way are inseparably attached to each other.

Same—Same—Same.—The company could not, by its grant, convey any part of the right of way in such manner or for such purposes as would sever the right of possession from the franchise to operate and maintain a railway line thereon.

Same—Same—Adverse Possession.†—It therefore follows that adverse possession cannot ripen into a right which would divert the use and occupation of such right of way from that to which Congress made the dedication.

Limitations.—The statute of limitations will not run against an action to maintain the integrity of the right of way granted by Congress for a specific use and purpose.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by the Oregon Short Line Railroad Company against

(U. S.), 4 R. R. R. 463, 27 Am. & Eng. R. Cas., N. S., 463 (approval of selection by land department); *Southern Pac. R. Co. v. Bell* (U. S.), 1 R. R. R. 286, 24 Am. & Eng. R. Cas., N. S., 286 (authority of secretary of interior to withdraw); *United States v. Southern Pac. R. Co.* (U. S.), 1 R. R. R. 273, 24 Am. & Eng. R. Cas., N. S., 273 (right to lands within conflict where grants conflict by crossing or lapping, effect of priority of location); note, 19 Am. & Eng. R. Cas., N. S., 214 (forfeiture); note, 1 Am. & Eng. R. Cas., N. S., 597 (nature and scope of grants to railroad companies); note, 1 Am. & Eng. R. Cas., N. S., 601 (indemnity lands); note, 11 Am. & Eng. R. Cas., N. S., 879 (pre-emption, use of lands for railroads a public use); note, 1 Am. & Eng. R. Cas., N. S., 618 (titles under land grants, how acquired); *Northern Pac. R. Co. v. DeLacy* (U. S.), 1 Am. & Eng. R. Cas., N. S., 657 (abrogation of grant to Northern Pac. R. Co.); *Burlington Gas Light Co. v. Burlington, C. R. & N. Ry. Co.* (U. S.), 11 Am. & Eng. R. Cas., N. S., 878 (abutting owner cannot enjoin use of public land by railroad); *Northern Pac. R. Co. v. Musser Sawtry, L. L. & M. Co.* (U. S.), 1 Am. & Eng. R. Cas., N. S., 617; *United States v. Winona & St. Peter R. Co.* (C. C. A.), 1 Am. & Eng. R. Cas., N. S., 454; *Wisconsin Cent. R. Co. v. Forsythe* (U. S.), 1 Am. & Eng. R. Cas., N. S., 487 (conflicting claims); *Barden v. Northern Pac. R. Co.* (U. S.), 1 Am. & Eng. R. Cas., N. S., 512; *Lake Superior Ship Canal & Iron Co. v. Cunningham* (U. S.), 1 Am. & Eng. R. Cas., N. S., 564 (construction of grants); *Southern Pac. R. Co. v. United States* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 598 (definite location of road, what is); *Southern Pac. R. Co. v. United States* (C. C. A.), 1 Am. & Eng. R. Cas., N. S., 603 (fraudulent location); *Southern Pac. R. Co. v. Brown* (U. S.), 5 Am. & Eng. R. Cas., N. S., 711; *Southern Pac. R. Co. v. Groeck* (U. S.), 1 Am. & Eng. R. Cas., N. S., 617 (location of road, selection of land granted); *United States v. St. Paul & S. C. R. Co.* (U. S.), 1 Am. & Eng. R. Cas., N. S., 656 (reverter not caused by mere failure to build road within period prescribed by congress); *Southern Pac. R. Co. v. United States* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 598; *Central Pac. R. Co. v. Nevada* (U. S.), 4 Am. & Eng. R. Cas., N. S., 264 (state taxation of land granted by congress to railroad); *Burlington Gaslight Co. v. Burlington, C. R. & N. Ry. Co.* (U. S.), 11 Am. & Eng. R. Cas., N. S., 878 (use by railroad of land reserved for public is a public use).

†For the authorities in this series on the subject of adverse possession against railroad companies, see foot-notes appended to *Chicago, B. & Q. R. Co. v. Hammond* (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 561; *Bubenzer v. Philadelphia, B. & W. R. Co.* (Del. Ch.), 12 R. R. R. 214, 35 Am. & Eng. R. Cas., N. S., 214.

Oregon Short Line R. Co. v. Quigley

Elizabeth Quigley and others. Decree for defendants, and plaintiff appeals. Reversed.

The plaintiff commenced this action in the lower court against the defendant to quiet its title to a right of way 200 feet wide across two adjoining tracts of land of 160 acres each, which were originally settled upon by Joseph Hendricks and Andrew Quigley, respectively. The plaintiff, the Oregon Short Line Railway Company, is the grantee and successor to the Utah & Northern Railway Company. On March 3, 1873, an act of Congress was approved granting a right of way to the Utah & Northern Railway Company over the public lands in the territories of Montana, Utah, and Idaho, which act is as follows (17 Stat. 612, c. 291) :

"An act granting the right of way through the public lands to the Utah and Northern Railroad Company.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that for the purpose of enabling the Utah and Northern Railroad Company, a corporation organized under the laws of the territory of Utah, to build and extend its line by way of Bear River Valley, Soda Springs, Snake River Valley, and through Montana territory to a connection with the Northern Pacific Railroad, by the most advantageous and practicable line, to be selected by said company, the right of way through the public lands in the territory of Utah, Idaho, and Montana is hereby granted to said company. Said right of way hereby granted to said company is to be the extent of one hundred feet in width on each side of the central line of said road where it may pass over the public lands. There is also hereby granted to said company all necessary ground, not to exceed twenty acres for each ten miles in length of the main line of said railroad, for station buildings, work shops, depots, machine shops, switches, side-tracks, turn-tables and water stations. And whenever it may be necessary to use material from the public lands for the construction of said road, it may be done; but no private property shall be taken for the use of said company, except in the manner now provided by section three of an act entitled, 'An act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-seven.

"Sec. 2. That said company shall be authorized and empowered to mortgage, in the usual manner, their franchise, roadbed, and all property belonging to said company, to an amount not to exceed fifteen thousand dollars per mile for the entire length of said road, upon such terms as may seem to them best; and upon said mortgage may issue mortgage bonds, not to exceed the same amount per mile; but in no case shall the United States be liable in any way whatever for anything done by said company.

Oregon Short Line R. Co. v. Quigley

“Sec. 3. That the rights herein granted shall not preclude the construction of other roads through any canyon, defile, or pass on the route of said road.

“Sec. 4. That the said railroad company shall locate the route of said railroad and file a map of such location within one year in the office of the Secretary of the Interior; and shall complete its railroad within ten years after the passage of this act; and nothing herein contained shall be construed as recognizing or denying the authority of the Legislature of Utah territory to create railroad corporations.

“Sec. 5. The Congress reserves to itself the right to alter, amend, or repeal this act whenever in its judgment the interests of the people may require it.”

In 1875, and after the lands in dispute had been surveyed and were open to sale and settlement, Quigley and Hendricks each located on a 160-acre tract of land, and continued, with their families, to occupy their respective lands until they thereafter acquired patents from the government. In 1878 the Utah & Northern Railway Company decided to build their road by way of Marsh Valley, Portneuf river, and Snake River Valley, instead of over the originally planned route by way of Soda Springs and Snake River Valley. In the course of the construction of the road and during the spring of '78, they came to the claims occupied by Quigley and Hendricks, and, in order to immediately construct over the lands so occupied, the railway company, on May 28th, through its trustee, Jay Gould, purchased from Quigley and Hendricks a right of way 60 feet wide across their respective possessory claims, and took from each a quitclaim deed, and at the same time took contracts from each wherein they agreed to execute to the railway company warranty deeds for such right of way upon receiving patent therefor from the government. The road was immediately constructed across these tracts of land, and was completed and in operation prior to the 20th of June following. On June 20, 1878, and after the construction and completion of the road, Congress passed an additional and supplemental act (20 Stat. 241, c. 362) to that of March 3, 1873, granting to the Utah & Northern Railway Company the right of way over the public lands by way of Marsh Valley, Portneuf river, and Snake River Valley, which act is as follows:

“An act creating the Utah and Northern Railway Company a corporation in the territories of Utah, Idaho, and Montana, and granting the right of way to said company through the public lands.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way through the public lands of the United States and other privileges heretofore granted by law to the Utah and Northern Railroad Company, are hereby modified and re-granted so as to enable the Utah and Northern Railway Company and its assigns to build their road by way of Marsh Valley, Portneuf

Oregon Short Line R. Co. v. Quigley

River and Snake River Valley instead of by the way of Soda Springs and Snake River Valley as originally granted.

"Sec. 2. And said company is hereby made a railway corporation in the territories of Utah, Idaho, and Montana, under the same conditions and limitations and with the same rights and privileges that it now has and enjoys under its articles of incorporation. Provided, that said corporation shall at all times hereafter be subject to all the laws and regulations in relation to railroads of the United States or of any territory or state through which it may pass. And suits against said corporation may be instituted in the courts of said territories or either of them having jurisdiction by the laws of such territory.

"Sec. 3. Congress may at any time add to, alter, amend or repeal this act."

No further transactions appear to have taken place between the railway company and Quigley and Hendricks or their successors in interest since the approval of the act of Congress of June 20, 1878. In the meanwhile the railway company have maintained and operated the road, and it is agreed that the company has used and occupied all of such right of way necessary or needful for its purposes during that time, and that the same has never at any time exceeded the 66 feet originally granted by quitclaim deed to Gould. No warranty deed has ever been given by Quigley and Hendricks, and does not appear to have ever been demanded by the railway company. On December 7, 1878, Quigley filed a homestead on his 160-acre tract, and received a final land-office certificate for the same on October 6, 1882, and thereafter received patent. Hendricks filed on his 160-acre tract on December 31, 1880, and received patent therefor December 23, 1882. In 1881 the railway company constructed fences along their right of way and across these tracts of land, the fences on each side of the track being 33 feet from the center of the track. The company did not file its map of location until May, 1881—some three years after the completion of the road. Quigley and Hendricks, their grantees and successors, have cultivated the lands on each side of the track continuously ever since the construction of the road up to within 33 feet of the center of the track. This action was commenced by the plaintiff to quiet its title to the full right of way of 200 feet wide, as granted by the act of Congress. The case was heard upon an agreed statement of facts, and the statement of facts was accepted and adopted by the court as his findings of fact, and upon such findings he drew his conclusions of law, which are as follows: "First. That the rights of the plaintiff under its grant from the United States did not attach to the lands in question until after the rights of the defendants had accrued. Second. That the plaintiff is estopped to assert or claim any rights in or to the lands in question, except the right of way thirty-three (33) feet in width upon each side of the center line of its roadbed as now located and used, being the right of way inclosed by the plaintiff with its fence. Third. That the rights

Oregon Short Line R. Co. v. Quigley

of the defendants, except as far as the same have been conveyed to the plaintiff, are superior to the rights of the plaintiff in and to the lands in question. Fourth. That the defendants should recover their costs in this action. And judgment is ordered accordingly." Judgment was entered for defendants, from which plaintiff appealed. Reversed.

P. L. Williams and *F. S. Dietrich*, for appellant.

Standrod & Terrell, for respondents.

AILSHIE, J. (after making statement of facts). The first question presented for our consideration is: Were the lands in dispute, on June 20, 1878, public lands of the United States over which Congress had the power to make such disposition as it saw fit by legislative grant? In this connection it should be remembered that up to that date the settlers, Quigley and Hendricks, had performed no act by which to initiate an inchoate right except that of settlement upon the lands. The power of Congress over the public lands is plenary so long as title thereto remains in the government, and no right of property therein has vested in another. *Northern Pac. R. R. Co. v. Smith*, 171 U. S. 268, 18 Sup. Ct. 794, 43 L. Ed. 160; *Norton v. Evans*, 82 Fed. 806, 27 C. C. A. 168; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *The Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920. It appears to have been uniformly held by the federal courts that an entry in the proper land office does not create any vested right in the entrymen as against the United States, and that Congress may, by subsequent legislation, dispose of the land to any one notwithstanding such entry. *King v. McAndrews*, 111 Fed. 871, 50 C. C. A. 29; *Norton v. Evans*, supra; *R. R. Co. v. Smith*, supra; *Frisbie v. Whitney*, 9 Wall. 187-196, 19 L. Ed. 668; *Wagstaff v. Collins*, 97 Fed. 3, 38 C. C. A. 19; *Campbell v. Wade*, supra; *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032. In the light of these authorities there is no room for doubt but that Congress had unrestricted power of disposition over these lands on June 20, 1878. Of course, while it is the rule that no vested right is acquired as against the United States until all the prerequisites for acquirement of title have been complied with, it still remains true that parties may, as against each other, acquire a preference right to take title to the public lands, and in all such cases the first in time is first in right. *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 526; *N. P. R. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 480; *Frisbie v. Whitney*, supra; *The Yosemite Valley Case*, supra. In the consideration of this question it should be borne in mind that the line of authorities holding that the lands which have been settled upon with a view to pre-emption or homestead are no longer public lands are cases arising over land grants in aid of the construction of roads or indemnity lands therefor, and not over

Oregon Short Line R. Co. v. Quigley

rights of way. In those grants Congress has in most, if not all, cases limited the right of the railroad company to such lands as have not been occupied by bona fide settlers, or to which no homestead rights have attached or been initiated. *Nelson v. N. P. R. R. Co.*, 188 U. S. 108, 23 Sup Ct. 302, 47 L. Ed. 406. And the courts have held in such cases that the right of the settler might be initiated at any time prior to the filing the map of definite location, or, as held in some cases, the actual construction of the road. No such reservation or exception, however, appears to have been made in any of the acts granting rights of way alone. *St. Joseph & Denver City R. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578.

It is next urged by respondents that no right vested in the railway company upon the passage and approval of the act, but that the vesting of title to the right of way was dependent upon the filing of a map of definite location, as provided by section 4 of the act of March 3, 1873. There could be only two purposes served by the filing of the map under the provisions of this section—the one for the information of the government and its land-office officials to apprise them of the occupation and disposition of the public lands belonging to the government; the other purpose for the information of settlers and purchasers who desire to acquire rights in such public lands. In this case the government is not complaining of such failure, and it does not appear upon what theory a settler can be heard to complain of the failure to perform an act by another which is solely for the information and benefit of the government. If, on the other hand, such failure has deprived the individual of any of his rights, or hindered him in the acquisition of any interest which he might otherwise have acquired, then he would certainly have a right to urge such objection. In this case the railroad was actually constructed over the land and was being operated at the date of the passage of the act of June 20, 1878, and constituted actual, rather than constructive, notice to Quigley and Hendricks, and all the rest of the world, as to the exact location of this right of way. By the actual location of the track upon the ground they were saved the necessity of consulting records and files of the land office in order to ascertain the definite location of such road. The road having been constructed prior to the passage of the act, the filing thereafter of a map of definite location could serve no one except the government. In *Jamestown & Northern Railroad Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 700, it was held that the grant of a right of way to the plaintiff which required the filing of such maps with the Secretary of the Interior was complied with, so far as the settler was concerned, upon the actual construction of the road, and that the entry of the defendant was subject thereto. The grant for right of way became definitely fixed by the actual construction of the road as effectually as it could have been by the filing of a map of location. It ceased to be a floating grant as soon as the road was constructed, and no one could thereafter

Oregon Short Line R. Co. *v.* Quigley

be misled as to the exact situs of the right of way. Every person thereafter acquiring title to any of the public lands through which this line of road was then constructed took the same subject to the right of way granted by the act of June 20, 1878. *St. Jo. & Denver City R. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 579; *Bybee v. Oregon & Cal. R. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305; *Doran v. C. P. R. R. Co.*, 24 Cal. 246.

It is also contended in this case that, notwithstanding the grant of the 200-foot right of way, the railroad company cannot take a decree quieting title to more than it occupies and uses or is actually necessary for the use for which the grant was made. We do not think this position can be sustained. Under these grants the question of the reasonable amount of land necessary for such use is not open to consideration and determination by the courts. The grant by Congress to the Utah & Northern Railway Company of a right of way 100 feet on each side of the central line of its track was a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use and carried with it the right of possession in the grantee therein named and its successor. *N. P. R. R. Co. v. Smith*, *supra*; *Pac. Co. v. Burr*, *New Mexico v. U. S. Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407.

Respondents have devoted much space in their briefs to the contention that the appellant's predecessor in interest, Gould, having taken deeds from Quigley and Hendricks to a 66-foot right of way, is therefore estopped at this time to deny the grantor's right or title. At the time the deed was executed it only conveyed to the grantee, Gould, the right of possession, for the reason that neither party had, or claimed to have, at that time any right or title in the property other than a right of possession at sufferance of the government. Neither party having any title, Quigley and Hendricks, being in possession, could maintain such possession as against Gould and the railroad company until such time as the latter might acquire a better right and title from the owner of the fee. Under the deed the grantee took a perpetual right of way so far as the grantor was able to convey, and the grantee was placed under no obligations to acknowledge his grantor as landlord, or ever at any time restore to him the possession so acquired. As a general proposition of law, the grantee named in a deed of conveyance does not hold in privity with his grantor, but rather holds adversely to the grantor, and is not estopped to deny the title of his grantor. *Bybee v. Oregon & Cal. R. R. Co.*, *supra*; *Merryman v. Bourne*, 9 Wall. 592, 19 L. Ed. 683; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; 11 A. & E. Ency. of Law (2d Ed.) 400, 440; 3 Wash. on Real Property (6th Ed.) sec. 1914; *Schuler et al. v. Ford et al. (Idaho)*, 80 Pac. 219. To this rule, as to most all other general rules, there are exceptions, but no reason has been called to our attention why this case should come under any of the exceptions to the general rule, and the doctrine of estoppel

Oregon Short Line R. Co. v. Quigley

be applied to the grantee named in the general deed of conveyance. The grantors have lost nothing by the transaction, nor have they been prejudiced in any of their rights or lulled to repose by any act of the grantee. On the contrary, they have profited by the transaction to the extent of the purchase price which they received for the execution of the quitclaim deeds.

It is finally argued by respondent that this action is barred by the statute of limitations in that the defendants and their predecessors in interest have been in the adverse possession of the whole of this right of way, except the 66 feet granted by their quitclaim deed, for the period of 27 years last past, and that the plaintiff is therefore barred from the prosecution of the action. It is also claimed that, in addition to the defense of the bar of the statute, the plaintiff is guilty of such laches in the assertion of his claim that he can no longer be heard in a court of equity. While the defendants and their predecessors have been in the actual possession of the premises and continued to cultivate the same, still the case does not present all the facts going to constitute adverse possession. But, as we read the authorities, there are potent reasons why the bar of the statute and the plea of adverse possession cannot prevail in a case of this kind. This grant by Congress of a right of way is not an absolute fee for all purposes, but is in the nature of a conditional grant, and limited to use and occupation by the grantee and its successors and assigns for the purposes of maintaining and operating a railroad. The franchise and the right of way in such case are inseparably attached to each other while in the possession and under the control and management of the grantee and its successors. The company could not, by its grant, convey any part of its right of way in any manner that would sever the right of possession from the franchise to operate and maintain a railway line thereover. *N. P. R. R. Co. v. Townsend*, 23 Sup. Ct. 671, 190 U. S. 267, 47 L. Ed. 1044; *East Ala. R. Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; *Yellow River Improvement Co. v. Wood County (Wis.)*, 51 N. W. 1004, 17 L. R. A. 92; *In re Canada Southern Ry. Co.*, 20 Am. & Eng. R. R. Cases, 196; *Union Pac. Ry. Co. v. Kindred (Kan.)* 23 Pac. 112; *East Tenn., V. & G. R. Co. v. West (Tenn.)* 14 S. W. 776, 10 L. R. A. 855; *N. P. R. R. Co. v. City of Spokane (C. C.)* 56 Fed. 917. And if it could not do so by its solemn grant, it certainly could not do so by any act which might be construed into a recognition of adverse possession. It must follow that the statute of limitations does not run in such cases against an action to maintain the integrity of such a right of way. *Southern Pac. R. R. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.

The contention that the plaintiff has mistaken its remedy, and that an action to quiet title will not lie in a case like this, is answered by this court adversely to respondent in *Johnson v. Hurst (Idaho)* 77 Pac. 791; *Shields v. Johnson (Idaho)* 79 Pac. 391; *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118. It follows, therefore, from what has been said, that the judgment of

San Antonio & A. P. Ry. Co. v. Kiersey

the trial court must be reversed, and it is so ordered, and the cause is remanded, with directions to make and file conclusions of law in harmony with the views herein expressed, and enter judgment in accordance therewith. Costs awarded to appellant.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

SAN ANTONIO & A. P. RY. CO. v. KIERSEY *et al.*

(Supreme Court of Texas, April 27, 1905.)

[86 S. W. Rep. 744.]

Railroad Trestle—Construction—Overflow—Injury to Land—Liability.*—In an action against a railroad company for damages to land by an overflow from the alleged negligent construction of a trestle, though the overflow was extraordinary, yet, if it could have been reasonably anticipated by railroad engineers of ordinary prudence and skill, and the trestle could have been so constructed as not to have caused the damage, a failure so to construct it would constitute negligence, but if the floods were unprecedented, and such as could not have been ordinarily anticipated by a prudent man skilled in the work, it would be the act of God, for which defendant would not be liable.

Damages—Evidence—Value of Land.—It was error to admit the evidence of witnesses as to the value of the land before the construction of the trestle, though other witnesses had testified that the value of the land was the same just before the flood as it was just before the construction of the bridge.

Measure of Damages.—In such a case the difference between the value of the land just before and just after the overflow is the proper measure of damages.

Damages—Prior Overflows—Separable Injuries.—It was proper to refuse a requested instruction that, as it appeared that the damages occurred in part prior to two years before the filing of plaintiff's action, there was no evidence on which to compute the damages, where there was evidence of damage less than two years before the action, which damages were separable from any that might have accrued at a prior time.

Overflows—Injuries to Land—Liability—Instructions.—In an action for damages caused by an overflow from the construction of a railroad trestle, the court charged that plaintiff sued for damages to the land by the failure of defendant to so construct its road across a bayou as not to interfere with the passing of water, and that if defendant so constructed its road that it materially interfered with the passage of the water, and thereby it was caused to stand on plaintiff's land, and the injury would not have occurred but for the construction of the trestle, plaintiff would be entitled to recover, and that if defendant defectively constructed the trestle, and as a consequence the channel was filled up and the waters were diverted, etc., plaintiff was entitled to recover, without the limitation that the injury would not have occurred but for the building of the road. Held, that a portion of the charge relating to the obstruction of the flow of water, and another to the filling up of the channel, whereby water was diverted, failure to apply the limitation to both portions might have misled the jury, and it was error to refuse a special instruction

*See foot-note appended to *Earhart v. Cowles* (Iowa), 12 R. R. R. 243, 35 Am. & Eng. R. Cas., N. S., 243, where all the preceding authorities in this series are collected.

San Antonio & A. P. Ry. Co. v. Kiersey

requested by defendant that, if the damages complained of would have resulted had the trestle not been constructed, plaintiff could not recover.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by L. D. & B. F. Kiersey against the San Antonio & Arkansas Pass Railway Company. A judgment of the Court of Civil Appeals (81 S. W. 1045) affirmed a judgment in favor of plaintiffs, and defendant brings error. Reversed.

A. W. Huston and W. S. Baker, for plaintiff in error.

Rice & Bartlett and Martin & Eddins, for defendants in error.

BROWN, J. The following statement of the pleadings of both parties is taken from the opinion of the Court of Civil Appeals: "The appellees, B. F. and L. D. Kiersey, sued the Aransas Pass Railway Company, appellant, by separate suits, which suits were consolidated, and in which appellees claimed damages to their land and crops located in the valley of Cow Bayou in Falls county, Texas, on account of overflows resulting from appellant's alleged defective and negligently constructed trestle across Cow Bayou. The appellant answered by general exception and special exceptions, and specially pleaded that the waters of Cow Bayou for the years 1899 and 1900 were unprecedented and extraordinary, and highest ever known within the memory of man, and too high to be foreseen and anticipated or provided against by persons of ordinary prudence, and that the channel and valley or Cow Bayou was a mile or more wide in some places. Appellant further alleged that it constructed its tracks carefully, skillfully, and scientifically, so as to provide against the very highest waters of Cow Bayou, in that it constructed all of the culverts and sluices demanded by the natural lay of the land complained of, and sufficient for its drainage, and that the appellant's bridge or trestle across the valley of Cow Bayou, and the channel thereof, was more than a quarter of a mile long, and extended from hill to hill, of the average height of about 15 feet, and supported by 12-inch piling, 12 feet apart, the whole distance, which was adequate and ample to admit of the passage of great floods in their natural flow without interruption. Appellant alleged that in the absence of its railway the same overflows would have resulted, and would have done the same damage; that they were acts of God. Appellant pleaded the statute of two years' limitation as against each of the appellees."

The honorable Court of Civil Appeals filed no separate conclusions of fact in the case, and we must assume that the evidence was sufficient to support the judgment of the trial court. The claim of the plaintiffs rested upon evidence which tended to prove that in the years 1899 and 1900 there were heavy rains which caused a very considerable rise in the waters of Cow Bayou, in Falls county, upon which the plaintiffs' lands were situated, and that the bridge of the defendant constructed across

San Antonio & A. P. Ry. Co. v. Kiersey

the said Cow Bayou at that point caused the water to flow out upon and to stand upon the lands of the plaintiffs for a considerable time, whereby the crops and the land of the said plaintiffs were greatly damaged. The railroad company constructed its bridge and trestle, which extended across the creek and from hill to hill, across the bottom land in 1889, and from that time down to the time of the overflow complained of there had been frequent inundations of the land. There was proof which was practically undisputed that the channel of the bayou had been filled with mud and driftwood, until it was not so deep as it was at the time that the bridge was constructed over it; and it was claimed by the plaintiffs that the filling up of the channel was caused by the improper construction of the bridge, which caused the extensive overflow of the water upon their lands. The evidence was conflicting as to whether the construction of the bridge and trestle had anything to do with the filling of the channel of the bayou. There was proof that the overflow which caused the damage sought to be recovered was unusual, and it was claimed by the defendant that it was unprecedented, and therefore that the defendant was not liable for the damages which resulted therefrom. The case was tried by a jury, and a verdict was rendered for B. F. Kiersey for \$2,498.75, and for L. D. Kiersey for \$1,751.25, and judgment rendered for each of the parties for the amount so found. The Court of Civil Appeals affirmed the judgment, and the railroad company applied to this court for writ of error, based upon the following assignments of error:

It is claimed that the trial court committed error in giving to the jury the following charge: "If you believe from the evidence that, although the overflows mentioned above were extraordinary, yet, if such an overflow could have been reasonably anticipated by railroad engineers of ordinary prudence, caution, and skill, and the building of the embankments and trestle could have so constructed them so as not to have caused the damage complained of, if any, then a failure upon the part of the defendant company to so construct the road at the point in question would, in law, constitute negligence." And: "If you believe that the floods of 1899 and 1900 were unprecedented (that is, such as could not have been reasonably anticipated by a prudent man skilled in such work as constructing railroads across such streams as the one in question), then it would be the act of God, for which the company would not be liable; and, if you so find, you will return a verdict for the defendant company." Plaintiff in error asserts that the trial court erred in refusing to give the following special charges requested by it: "It appearing from the undisputed evidence in this case that the damages complained of by the plaintiff to the lands occurred in part prior to two years before the filing of plaintiff's suits, and it appearing that there is no evidence showing what part of the damages complained of to said land occurred within two years—no basis for computing said damages to said land has been shown—you will therefore find for the defendant." "If you believe from all of the evidence

San Antonio & A. P. Ry. Co. v. Kiersey

in this case that the damages which the plaintiffs complain of, to their lands and crops, would have resulted had not the defendant's trestle, as complained of by the plaintiffs, been built across the valley of the Cow Bayou, you will find for the defendant." The court did not err in giving the two charges set out above, complained of by the defendant in error. The charges correctly presented to the jury the law applicable to the facts. *Railway Co. v. Pomeroy*, 67 Tex. 501, 3 S. W. 722; *Railway Co. v. Holliday*, 65 Tex. 519.

There was error in admitting the evidence of the different witnesses as to the value of the land before the construction of the bridge and trestle. The difference between the value just before and just after the overflow is the proper measure of damages to the land. *Railway Co. v. Schofield*, 72 Tex. 500, 10 S. W. 575. The honorable Court of Civil Appeals held that this error was harmless, because other witnesses testified that the value of the land was the same just before the flood as it was just before the construction of the bridge; but, as we read the record, the strength of the evidence as to the value of the land is in the testimony relating to such value before the construction of the railroad, and we think it might have influenced the jury in arriving at the value of the land just before the flood came.

The court did not err in refusing to give the charge requested by defendant on the subject of limitation, because there was evidence of damage to the crops which occurred in the year 1899, less than two years before the filing of the suit, for which recovery might have been had, and which was separable from any damage which might have accrued at a time prior thereto. Under this evidence the defendant was not entitled to a verdict as against the entire claim of the plaintiffs. In the general charge the district judge had limited the right of recovery to such damages as were shown to have accrued within two years prior to the institution of the suits.

The court stated the ground of the plaintiffs' claim against the defendant in this language: "The plaintiffs in the above entitled and numbered causes sue to recover damages from the defendant company for injury to the property described in the petition of each, occasioned by the failure of the defendant company to so construct its road across Cow Bayou as not to interfere with the passing of the water through the valley at a point where the plaintiffs' property is situated." A defense to this claim on the part of plaintiffs was presented by the charge requested and refused, if the facts stated were true, because it is apparent that, if such damage would have accrued in the absence of the structure, then its existence could not have caused the damage and the defendant was entitled to have that defense presented in an affirmative form. *Railway Co. v. Hall*, 85 S. W. 786, 12 Tex. Ct. Rep. 377; *Railway Co. v. Ayres*, 83 Tex. 268, 18 S. W. 684; *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058.

The defendants in error claim that this paragraph of the gen-

San Antonio & A. P. Ry. Co. v. Kiersey

eral charge embraced the defense presented by the special instruction refused:

"If, therefore, you believe from the evidence before you that the defendant railway company so constructed its road across the valley of Cow Bayou at the place in question that it materially interfered with passage of the water through the channel and valley of said Cow Bayou, and that by reason of such interference, if any, the water was caused to stand upon plaintiffs' lands and to crops to such an extent as that such lands and crops, or either, were injured, and you further find that said injury, if any, would not have occurred but for the construction of its said road across said valley in the manner in which same was constructed, then, if you so find, the plaintiffs would be entitled to recover."

If this was the only expression upon the right of plaintiffs below to recover, the language, "and you further find that said injury, if any, would not have occurred but for the construction of its said road across said valley in the manner in which same was constructed, then, if you so find, the plaintiffs would be entitled to recover," is not so explicit a presentation of the defense as to justify the refusal of the special request of the defendant. But the court also instructed the jury as follows:

"If you believe from the evidence that defendant company defectively constructed its roadbed across the Cow Bayou, in manner and form as stated in plaintiffs' petitions, and that, as a direct consequence of such defective construction, the channel of said creek was filled up, and you further believe from the evidence that, as a direct consequence of the defective construction of said road and the filling up of said channel of said creek, surface waters which had been diverted from their natural and ordinary course were caused to flow over plaintiffs' said lands, and that they destroyed plaintiffs' crops of cotton, if any they had growing thereon, then you will find for plaintiffs the reasonable market value of said crops," etc.

The first charge quoted above related to the obstructing of the flow of the water through the channel and valley as a ground of recovery, while the second points directly to filling of the channel, whereby the water was caused to flow over the valley, and to the latter the defense is not made to apply. The difference in the charges was calculated to lead the jury to believe that the same limitation did not apply to damages caused by the filling of the channel as was applied to obstructing the flow of the water.

Because the court erred in refusing the special charge, the judgments of the district court and Court of Civil Appeals are reversed, and the cause remanded.

CHICAGO UNION TRACTION CO. v. LUNDAHL.

(Supreme Court of Illinois, April 17, 1905.)

[74 N. E. Rep. 155.]

Directing Verdict.—In an action for injuries, the refusal of the court to instruct to find defendant not guilty raises the question whether there is any evidence in the record fairly tending to support the cause of action, and, if there is such evidence, it is not error to refuse such request.

Negligence.—In an action for the death of a boy 10 years and 8 months old while attempting to board a street car, evidence held sufficient to establish negligence on the part of the carrier.

Same—Boarding Moving Car.*—That intestate attempted to board a train of slowly moving street cars was not negligence per se.

Passengers or Trespasser—Evidence—Possession of Money.—Where, in an action for death of a boy while attempting to board a street car, defendant introduced a witness who testified that deceased and his companion were attempting to steal a ride, and that the conductor was chasing the boys therefrom, evidence that intestate's companion had 20 cents in money at the time was admissible as tending to show that the boys had sufficient money to pay therefor.

Same—Same—Same—Right to Object.—Where, in an action for death of a boy while attempting to board a street car with a companion, defendant claimed they were stealing a ride, but, after evidence had been introduced showing that the mother of deceased's companion, before they started, had given him 20 cents in money, the court, on defendant's objection, excluded evidence as to what she said when the money was given, defendant could not thereafter object that there was no evidence that the money was given the boy to pay car fare for both.

Appeal from Appellate Court, First District.

Action by August Lundahl, as administrator of the estate of Herbert S. Lundahl, deceased, against the Chicago Union Traction Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

This is an action on the case, brought on May 8, 1902, by the appellee, as administrator of the estate of Herbert S. Lundahl, deceased, against the appellant company, to recover damages for an injury resulting in the death of appellee's intestate. The trial resulted in verdict and judgment in favor of the appellee, which judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment of affirmance.

John A. Rose and *Albert M. Cross* (*W. W. Gurley* of counsel), for appellant.

E. C. Wood and *Elmer & Cohen*, for appellee.

MAGRUDER, J. The errors relied upon by the appellant for reversal are two only: First, the refusal of the peremptory instruction in writing requested by the appellant at the close of all the evidence, directing the jury to find the defendant not guilty;

*As to whether it is contributory negligence to board a moving street car, see *Southern Ry. Co. in Miss v. Williams* (Miss.), 12 R. R. R. 90, 35 Am. & Eng. R. Cas., N. S., 90.

Chicago Union Traction Co. v. Lundahl

and, second, "the ruling of the trial court in admitting evidence that the companion with deceased had 20 cents in his possession, there being no evidence that the deceased had any money to pay fare, or that the companion intended to pay the fare of deceased."

1. The refusal of the court to instruct the jury to find the appellant not guilty raises the question whether there is any evidence in the record fairly tending to support the cause of action, and, if there was evidence tending to establish the cause of action in this case, it was not error for the court to refuse a peremptory instruction to the jury to find the defendant not guilty. *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017; *Chicago City Railway Co. v. Loomis*, 201 Ill. 118, 66 N. E. 348; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12; *Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831; *Chicago & Alton Railroad Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161. A careful examination of the evidence shows that there was proof tending to establish the fact that the deceased was in the exercise of ordinary care for his own safety at the time when the accident occurred, and that the appellant company was guilty of such negligence as caused the accident which resulted in the death of the deceased. The deceased, plaintiff's intestate, was a boy 10 years and 8 months old. On November 16, 1901, he went with his cousin, a boy older than himself, and about 12 years of age, to the southwest corner of North Clark and Elm streets. His companion and cousin 12 years old was named Ernest Anderson, and lived with his parents at 450 Clark street. The deceased, Herbert S. Lundahl, 10 years and 8 months old, lived on the West Side. The evidence tends to show that on the day in question, which is described by one or more of the witnesses as being a clear day, the two boys at about 1 o'clock in the afternoon went to the corner already named for the purpose of taking the car coming from the north and proceeding southward. There is some conflict in the testimony as to where the boys were standing when the south-bound train came along. The evidence of the plaintiff tends to show that they were about four feet east of the sidewalk curbing on the west side of the street at the southwest corner of Elm and Clark streets. The train bound southward consisted of a grip car and two trailers in the rear of the grip car. The evidence of the plaintiff tends to show that as the train approached the corner in question, the older boy, Ernest Anderson, raised his hand as a signal to the train to stop, and that the train slackened its movement, and, in the language of some of the witnesses, "almost came to a standstill," although it did not entirely stop. The expression in the testimony is that it "began to slow up." The boy Anderson says, "It stopped slow like, still." When the movement of the car was thus slackened, the elder boy succeeded in getting upon the front platform of the trailer next to the grip car. The deceased attempted to get upon the platform of the hindmost car, and succeeded in getting hold of the rail with one

Chicago Union Traction Co. v. Lundahl

hand and in putting his foot upon the step of the platform. While he was in this position, the car was suddenly and rapidly moved forward with what the witnesses call "a sort of jerk," which had the effect of throwing the deceased from the car upon the ground, and after he had fallen to the ground the car passed over his body and killed him.

The testimony on the part of the appellant company contradicts in important particulars the evidence introduced in behalf of the plaintiff. The servants of the appellant company in control of the train say that no signal was given to stop the train; that they did not see the boys; and that the motion of the cars was not slackened, but that they passed the crossing at the usual speed. While, however, the testimony is conflicting, it cannot be said that there was no testimony tending to sustain the cause of action. If the testimony of the witnesses for the plaintiff was true, the plaintiff established his cause of action, and was entitled to recover. Whether it was true or not was a matter for the determination of the jury. The testimony is uncontradicted that the point at which the witnesses in behalf of the plaintiff testified that the car slackened its motion, and at which the testimony of plaintiff's witnesses tended to show that the boy Anderson raised his hand as a signal for the car to stop, was the usual place for the stopping of the cars to take on passengers. The point in question was at the southwest corner of Clark and Elm streets, being the south side of Elm street, where a train of cars coming from the north would cross it. The two boys were standing together, and the signal given by the older boy was given in behalf of both of them. The fact that the car slackened its motion and almost stopped tends to confirm the statement of plaintiff's witnesses that the older boy did raise his hand as a signal for the train to stop, and that the gripman saw the signal. There is no evidence to the effect that anybody else than the boy Anderson gave a signal to the train to stop, and it would not be likely to slacken its motion in the way indicated by the witnesses unless the parties in control of the train had received such a signal. The slackening of the movement of the train so as to make it almost stop in obedience to the signal alleged to have been given was an invitation to the boys to get upon the train.

The fact that the train was moving slowly when the attempt was made to board it is not evidence of negligence per se. It has been held by this court in a number of cases that "it is not negligence per se to get on or off a slowly moving car, whether propelled by horse power or electricity or cable." *Cicero & Proviso Street Railway Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; *North Chicago Street Railroad Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407; *North Chicago Street Railroad Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Springfield Railway Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *Chicago Union Traction Co. v. Hanthorn*, 211 Ill. 367, 71 N. E. 1022. The question whether the boarding of a street car in motion is or is not negli-

Chicago Union Traction Co. *v.* Lundahl

gence is a question of fact to be submitted to the jury for their determination under the instructions of the court, and the decision of the question will depend upon the facts and circumstances of each case, rather than upon any fixed or absolute rule as to what constitutes negligence.

In *Cicero & Proviso Street Railway Co. v. Meixner*, supra, this court, quoting from *Booth on Street Railway Law* (section 336) said (page 325 of 160 Ill., page 825 of 43 N. E. [31 L. R. A. 331]): "It is a general rule, established by numerous decisions, that if a person who has the free use of his faculties and limbs has given proper notice of his desire to be taken up, and the speed of the car has been slackened in the usual manner, it is not negligence per se to attempt to get on while it is moving slowly, and that if a person is injured under such circumstances the question of his contributory negligence is ordinarily one of fact for the jury." In the same case it was also said: "It is well known, also, that street car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed, and immediately starting up at a greater speed when the passenger is safely aboard, or has alighted. It would be impossible for a court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held in contributory negligence."

In *Cicero & Proviso Street Railway Co. v. Meixner*, supra, it appeared that in that case plaintiff attempted to get on a car which had slackened down to a slow rate of speed, and, as the car went by, caught the hand rails on each side of the front platform, when the speed of the car was suddenly accelerated, and he lost his hold, and was dragged a considerable distance, and thrown under the wheels of the car. The facts in that case, as thus detailed, are similar to the facts in the present case. It also appeared in that case that the motorman and several passengers on the front platform testified that the speed of the car had not been decreased when the plaintiff attempted to board the same, and that no signal was seen. Similar evidence was given in the case at bar by appellant's servants in control of the train. Such testimony, however, on the part of the gripman and passengers in the *Meixner Case* was not allowed to establish the facts that a signal was not given, and that the speed of the train was not slackened, as against the evidence to the contrary of the plaintiff and his witnesses. So, in the case at bar, the jury, who saw the witnesses on both sides, had a right to believe, and evidently did believe, the testimony of the plaintiff's witnesses that a signal was given to the car to stop, and that the movement of the car was slackened. In view of the foregoing observations, it cannot be said that there is no evidence in the record tending to show that the deceased was not in the exercise of such ordinary care for his

Chicago Union Traction Co. v. Lundahl

own safety as a boy of his age and capacity would be expected to exercise. The court gave, on behalf of the appellee, instructions to the jury to the effect that they might take into consideration whatever the proof might "show as to the age, capacity, and discretion of the deceased under all circumstances surrounding him at and just prior to the accident, so far as shown by the proof, and then determine whether from his age, capacity, and discretion he acted with the care and caution for his own safety that one of his age, capacity, and discretion ordinarily would exercise under similar circumstances to those shown by the proof." The court also gave, in behalf of the appellant, and at its request, an instruction to the effect that the jury "must believe from a preponderance of the evidence in the case that plaintiff's intestate was himself, at and just before the alleged injury, in the exercise of ordinary care for one of his age, intelligence, experience, and ability to know and understand the danger and care of himself."

In *Cicero & Proviso Street Railway Co. v. Meixner*, supra, where, while the plaintiff was trying to board the car, its speed was suddenly accelerated so as to throw him off, this court said (page 326 of 160 Ill., page 825 of 43 N. E. [31 L. R. A. 331]): "It is the duty of those having control and management of cars designated for traffic on the public streets to bring such cars to a full stop at such places as are convenient and necessary for the purpose of discharging and receiving passengers."

In *North Chicago Street Railroad Co. v. Cook*, 145 Ill. 551, 33 N. E. 958, it was held that it was the duty of a street railway company to stop its car a sufficient length of time to enable persons seeking passage to get fully and safely on the same, and that such company would be liable to a party injured by a failure to properly discharge such duty; and it was there further held that it was the duty of the conductor of a street car or train to know, if by the exercise of due care, caution, and diligence he can know, whether any person is attempting to get on or off his train or car, before permitting the same to start in such a manner as will be liable to injure a person so getting on or off the same. If the testimony produced by the plaintiff in this case was true, a signal was given to appellant's servants in charge of this train to stop the car, and the motion of the car was slackened to enable these boys to get upon it; and if, while the deceased boy was trying to board the train, the conductors, or either of them, or the gripman, suddenly accelerated the motion of the car by a kind of jerk, so as to throw the boy off, it cannot be said that there is no evidence tending to show negligence on the part of the servants of the company. Two special interrogatories were submitted to the jury, and answered by them. The first was: "Was the plaintiff's intestate (meaning the deceased boy), just before and at the time of the accident complained of, in the exercise of such care for his own safety as might be reasonably expected from one of his age, intelligence, experience, and capacity?" And to this question the jury answered, "Yes." The second was: "Was

Chicago Union Traction Co. v. Lundahl

the defendant guilty of the negligence charged against it in the declaration herein?" And the answer to this question was "Yes." We are therefore of the opinion that the court committed no error in refusing the peremptory instruction, requested by the appellant, to find it not guilty.

2. The only other alleged error complained of by the appellant is that the court admitted testimony tending to show that the boy Anderson had 20 cents in money in his pocket. Upon this subject the record shows the following in the testimony of the boy Anderson: "Q. Now, what, if any, money did you have with you at that time?" (Objected to by defendant; objection overruled; exception by defendant.) A. Twenty cents. My mother gave me that money. We were going over to the West Side, to Herbert Lundahl's house, at Elizabeth and Austin avenue." The witness Anderson was then asked this question: "Q. What did she say to you when she gave it to you?" This question was objected to by appellant's counsel, and the court sustained the objection, and refused to permit the witness to answer the question. We think that it was proper to permit the boy Anderson to state that he had 20 cents, and that his mother gave it to him. The appellant company put a boy named Spoor, 14 years old, upon the witness stand, and sought to show by him that the deceased and his companion, Anderson, were trying to steal a ride upon the train, and that the conductor was chasing the boys off the train. This testimony is not supported by the other witnesses of the appellant, nor by any of the facts and circumstances in the case. As the conductors and gripman swore that they did not see the boys, it was not possible that they were trying to drive them from the train. But in view of the character of the testimony introduced, which had a tendency to make the jury believe that the boys were trying to steal a ride, the evidence in regard to the possession by the older boy of 20 cents was proper. It tended to show, in connection with the other evidence, that the boys had money enough to pay their fare. The older boy was evidently intending to accompany the younger boy his cousin, to his home on the West Side. Anderson, the older boy, swears that his mother gave him the 20 cents. It is said on the part of the appellant that this was not followed up by any evidence to the effect that the money was given to the boy for the purpose of enabling him to pay the fare. Counsel for appellee asked the witness what his mother said to him when she gave him the money, and the evidence was excluded because of the objection made by counsel for appellant. If the witness had been allowed to answer the question, it may have been proven that the mother told him to use the money so given to him for the purpose of paying his fare and that of his cousin.

In *Chicago & Eastern Illinois Railroad Co. v. Huston*, 196 Ill. 480, 63 N. E. 1028, it was held that, where the principal controversy in an action to recover for the death of a boy is whether the deceased was a trespasser on the tracks, or was crossing the tracks to take passage on a train then about due, it was not error

Chicago Union Traction Co. v. Lundahl

to permit the boy's father to testify that he had given the son a nickel to pay his fare home some half an hour before the happening of the accident. See, also, *Ohio & Mississippi Railroad Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

Inasmuch as the appellant, by its objection, prevented the introduction of testimony on the part of the appellee for the purpose of showing that the money was given to the boys to pay their fare, appellant is here estopped from assigning as error that evidence was not introduced to show what the money was given to the boys for. "There is no principle of law more familiar than that a party shall not be permitted to assign for error that which he has requested the court to do." "The appellant must be consistent, and if he asks the court below to make a specific ruling, or to proceed in a certain manner, he cannot complain in an appellate court that the ruling or action is erroneous. He has invited the error, must accept its results, and the appellate court will not reverse a judgment at his instance on account of it." *Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898. As is said by the Appellate Court in their opinion in this case: "Citations of cases to the effect that possession of a railroad ticket or pass by a person who attempts to board a train does not constitute him a passenger on such train are manifestly beside the point under discussion here." The issue in this case was not really whether or not the deceased was a passenger, so as to charge appellant with the high degree of care which common carriers must take in reference to their passengers. It was sufficient in the present case to show that the appellant was not in the exercise of ordinary care, and the case was tried upon the issue whether or not the appellant was in the exercise of ordinary care at the time the accident occurred. In other words, the testimony as to the possession of the money by the older boy was admitted in evidence, not for the purpose of establishing the relation of carrier and passenger between appellant and the deceased, but for the purpose of negating appellant's theory that the boys were trying to steal a ride, or, as some of the witnesses express it, to "flip" the cars.

As we find that the court committed no error in refusing to give the peremptory instruction to find the appellant not guilty, and committed no error in admitting the testimony as to the possession of the money, and as these two points are the only ones insisted upon by the appellant in its argument, we see no good ground for reversing the judgment in this case. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

FAGAN v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, March 15, 1905.)

[60 Atl. Rep. 672.]

Injury to Passenger—Collision—Presumption of Negligence.*—In an action for injuries to a passenger by a collision between a car in which he was riding and a vehicle which turned on the track from a country road, the fact of the collision raised no presumption of negligence.

Same—Evidence—Admissibility.—In an action for injuries to a passenger owing to a collision between an electric car and a vehicle which turned off a road onto the track, evidence whether the track was wet or dry on the night in question, and testimony as to how far witness could see on such a night, and within what distance a car could be stopped at the place where the accident occurred was inapplicable, in the absence of any evidence that the vehicle was on the track until the instant of the collision.

Action by Margaret Fagan against the Rhode Island Company. Heard on petition of defendant for a new trial, and judgment rendered for defendant.

Argued before DOUGLAS, C. J., and DUBOIS, J.

David S. Baker and Lewis A. Waterman, for plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

DOUGLAS, C. J. The plaintiff in this action has recovered a verdict for \$1,130 for the loss of services of her minor son, who was injured while a passenger upon one of the defendant's electric cars upon the road between Providence and Riverside. The defendant brings its petition for a new trial on the grounds that the verdict is against the evidence on the issue of the defendant's negligence and in the award of excessive damages, and that the presiding justice erred in admitting certain evidence against the defendant's objection. The plaintiff's son, a boy about 14 years of age, was riding in a closed car of the defendant corporation upon a country road about midnight on the night of September 8, 1903, on the way to Riverside. The track on which the car ran was located at the extreme westerly side of the road, outside of the ordinarily traveled way. The moon was shining, but its

*See foot-notes appended to *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1; *Cheetham v. Union R. Co.* (R. I.), 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292; foot-notes appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *Jones v. United Railways & Electric Co.* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631; *Allen v. Northern Pac. Ry. Co.* (Wash.), 12 R. R. R. 838, 35 Am. & Eng. R. Cas., N. S., 838; *Logan v. Metropolitan St. Ry. Co.* (Mo.), 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; *Thurston v. Detroit United Ry. Co.* (Mich.), 12 R. R. R. 434, 35 Am. & Eng. R. Cas., N. S., 434; foot-notes appended to *Cronk v. Wabash R. Co.* (Iowa), 12 R. R. R. 429, 35 Am. & Eng. R. Cas., N. S., 429.

Fagan v. Rhode Island Co

light upon the track was obstructed by overshadowing trees alongside the road. Shortly before the collision the motorman turned off the power and rang his gong, and immediately before the collision occurred he applied his brake and attempted to put sand upon the track. Almost instantly after the brakes were set the car struck a team of horses and came to a stop, with one horse under the front of the car and another lying dead in the road. The plaintiff's son, who was sitting in the front corner of the car with his head resting on his arm supported by the window ledge and sleeping, was thrown to the floor by the shock and injured. These are all the facts pertinent to the case which were known to any person in the car except the motorman. The conductor was standing inside the door, figuring his day card. One passenger says he got a glimpse of the team just before it was struck, and describes the situation after the collision; but he gives no information as to the cause of the accident. He says the gong was rung. Another passenger says: "The car stopped quite suddenly, and I heard the glass breaking and the woodwork was all splintered up; so I knew there was something the matter." The motorman's story is: That, proceeding at an ordinary rate of speed, he saw at some distance ahead, but in the traveled part of the road, a dark object, which soon appeared to be a pair of horses followed by a covered wagon. At this time he turned off the power and rang his gong, but saw no occasion to apply the brake, as the wagon and horses were clear of the track. That suddenly, when close to the car, the team turned in upon the track, and he at once used every means to stop, but without success. The car and the horses came together, and the horses were thrown down and the wagon overturned. He testifies as follows: "Q. Did you meet with an accident that night? A. I did, sir. Q. Whereabouts? A. Between Bay View and Pomham, right opposite the Golf Club ground. Q. At that point, on that night, how far could you see? A. Well, it was a moonlight night, but it was not extra light at the spot where I was. It was a very dark spot on the road. Q. Why was that a dark spot? A. It was right under the trees. Q. Did you have your lights lighted? A. Yes, Sir. Q. Do you know where the track is at that point? A. I do, sir. Q. On which side of the road? A. It is on the right-hand side towards Crescent Park. Q. That is on the west side? A. On the west side, I think. Q. And it was on September 8th, on the same place? A. Yes, sir. * * * Q. Now, did you come in contact with anybody that night? A. At the time of the accident I struck a team. Q. What team was it—what sort of a team? A. Two horses, side by side; one hitched in the harness and the other leading right alongside of it. Q. That is when you saw it? A. Yes, sir. Q. Then what did you see? A. Well, I see the team at a distance on the road, when I noticed a dark spot. I noticed a dark spot on the road and it was off the track; and there was no danger from me hitting it, and they suddenly turned right on the track, and I put on my brakes and done all I could to stop the car. Q. When did you

Fagan v. Rhode Island Co

first put your brake on? A. Just as soon as I noticed the horses made a bee-line for the track. Q. You say at that time the horses were side by side? A. Yes, sir. Q. Was there any light upon the team? A. No, sir; not at all. Q. Relative to your ringing the bell, I will ask you what you did? A. I did ring the bell, and the parties inside of the car, I asked them, and they said 'Yes.' Mr. Baker: Never mind about that. Q. Just what you remember yourself, Mr. Belcher. When this team was upon the track in the manner that you have described, you say you did what to stop the car? A. I put on the brakes. Q. What else? A. I loosened the brake again, and pulled on the reverse, but the car slid just the same, and I threw the reverse off again and pulled the brake and made a grab for the sand. But at the same time I was thrown clear through the door. Q. When you made a grab for the sand you were thrown? A. Yes, sir. Q. What threw you? A. We struck the team, and that must have banged me through the door, sir. Q. Were you injured? A. Yes, I had a broken leg by it. Q. Is that the trouble with you now? A. That is the trouble with me now." The driver of the wagon testifies that he had been distributing bread in Bristol, having started from Providence at 5 o'clock in the morning, and was returning home with one of the horses harnessed between the shafts of the wagon and the other tied behind. Weary with his day's work, he fell asleep, and allowed his team to wonder at its will. When he was awakened by the shout of the motorman at the moment of the collision, both horses were in front of the wagon, and his inference from the facts is that the horse which was tied behind had broken his fastening and strayed in front of the wagon, joining the one in harness, and possibly crowding him upon the track. A boy in the wagon was also asleep, and knew nothing until he was waked by the overturn of the wagon.

The plaintiff bases her right to recover upon the claim that the fact of the collision is sufficient in itself to prove negligence on the part of the defendant's servants who were managing the car; that, although the motorman offers a satisfactory explanation, if true, the jury were not required to believe him, and their verdict should stand. Undoubtedly, if the collision had been between two cars operated by the defendant, the implication of negligence would have been irresistible. If the collision had been with a team in a frequented city street, where care is always necessary to avoid collisions, and where proper care will generally avoid them, the implication would arise that proper care had not been used, and the burden would have been upon the company to show that it had not been negligent. *Shay v. Camden & Sub. Ry. Co.* (N. J. Err. & App.) 49 Atl. 547. So, if the collision had been between a street car and a steam car at a crossing, as in *Chicago City Ry. v. Engel*, 35 Ill. App. 490; or between a steam car and some obstruction on its own right of way, which it was the duty of the company to keep clear, as in *Railroad Co. v. Brown*, 9 Ohio Cir. Ct. R. 198; or if the admitted circumstances of the case were such that they probably involved

Fagan v. Rhode Island Co

negligence on the part of the company—then the burden would have been thrown upon the company to explain such circumstances, and to show to the satisfaction of the jury that their employes had observed due care. The remarks of Ruggles, J., in *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 242, 64 Am. Dec. 502, are instructive upon this point. "In actions like the present," he says, "the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff. The same rule applies as in an action for an injury to a passenger in a stage coach. It generally happens, however, in cases of this nature, that the same evidence which proves the injury done proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside the car, and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier. It is incorrect, therefore, to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the cause of the injury, or from other circumstances attending it, and not from the injury itself." The last paragraph is quoted with approval in 3 *Thomp. Neg.* sec. 2756. The same principle is stated in *Murray v. Pawtuxet Valley St. Ry. Co.*, 25 R. I. 209, 210, 55 Atl. 491, where the court says: "The burden of proving that the accident was due to the negligence of the defendant was sustained by the presumption of negligence arising out of a consideration of the cause of the accident itself."

Is there any presumption of negligence in this case? We have here a collision between a car and two horses, one wandering about the road, unattached, and the other harnessed to a wagon the driver of which was asleep. Is it a reasonable implication from these circumstances that the motorman carelessly ran into the horses at the peril of his own life and to the damage of his limbs, after seeing the team on the track a considerable distance away, in time to have stopped his car before meeting it? We think it much more reasonable to suppose that the horses, seeing the bright light of the approaching car, were dazzled and confused, and in their unguided stupidity rushed into the danger which a reasonable being would have avoided. The mind requires proof to establish the less probable of two contradictory propositions. And the evidence here is all the other way. Leav-

South Covington & C. St. Ry. Co. v. Smith

ing out of account, therefore, the evidence of the motorman, we think the plaintiff has failed to make out a case against the company. The account of the transaction given by the motorman is reasonable and consistent, and was sustained unchanged under a severe cross-examination. Counsel for the plaintiff was permitted to criticise his refusal to estimate the distance at which he first saw the team under the shadow of the trees. His testimony, as reported, seems to us that of a cautious and truthful witness who properly declines to guess when he cannot speak from accurate knowledge. Yet his reluctance in this regard was made prominent by persistent questioning of counsel, as if it were a disposition to suppress the truth, and must have prejudiced him in the minds of the jury.

Some evidence was introduced to show whether the track was wet or dry on the night in question, and several witnesses were presented who told how far they could see on such a night, and within what distance they could stop a car at the place where the accident occurred. All this testimony was inapplicable in the absence of any evidence that the team was on the track until the instant of the collision; but it served the purpose of diverting the minds of the jury from the true issue, and of throwing discredit upon the carefulness of the motorman. With these false issues before their minds, and probably moved by the sympathy for the boy which the detailed account of his injuries and sufferings was calculated to excite, the jury returned their verdict. Stripped of these features, the case is one where neither fact nor presumption is in the plaintiff's favor, and the burden which the law places upon her is not sustained.

As these considerations are conclusive against her right to recover, we are relieved from the necessity of discussing the question how far a jury may be supported in disregarding the only evidence upon an issue when it comes from an interested witness, and the case is remitted to the common pleas division, with direction to enter judgment for the defendant.

SOUTH COVINGTON & C. ST. RY. CO. v. SMITH.

(Court of Appeals of Kentucky, May 2, 1905.)

[86 S. W. Rep. 970.]

Injury to Passenger—Electric Shock—Negligence—Contributory Negligence—Questions for Jury.—In an action against a street railroad company for injuries to a passenger by a shock received from the controller box on a car, evidence examined, and held that the questions of plaintiff's contributory negligence and of defendant's negligence were for the jury.

Excessive Verdict.—Plaintiff suffered an electric shock, which rendered him unconscious until the next day. His arm was paralyzed, and his hand clenched so that he could not open it for some weeks, and at the time of trial he had about one-fifth of the strength in the arm that he had had before. The medical testimony was doubtful as to whether the injury would be permanent, and it was shown that he

South Covington & C. St. Ry. Co. v. Smith

suffered a great deal, and could not work at all, and his capacity to earn was reduced from \$9 to \$7 a week. Held, that a verdict of \$4,000 was not excessive.

Instructions.—An appellant cannot complain of an instruction given on his own motion.

Carriers of Passengers—Degree of Care—Instructions.*—In an action against a carrier for injuries to a passenger on an electric car by an electric shock from the controller box, the court instructed that the jury should find for plaintiff if defendant failed to use the utmost care to prevent the current from being in the box; and also instructed that, if defendant used the utmost care and skill ordinarily used by persons in the same business to guard against such injuries, plaintiff could not recover. Held that, taken together, the two instructions were proper.

Damages.—Where, in an action for personal injuries, the complaint alleged that plaintiff had expended \$200 for medical attention, failure of the court to limit the jury to \$200 in such regard was not error, there being no evidence on the subject save evidence as to the \$200 bill.

Injury to Passenger—Presumption of Negligence.†—Where the controller box on an electric car was charged with electricity to such an extent as to endanger the safety of passengers who might accidentally touch it, an inference of negligence was warranted.

Appeal from Circuit Court, Campbell County.

“Not to be officially reported.”

Action by Charles Smith against the South Covington & Cincinnati Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. J. Crawford, for appellant.

Phil J. Ryan and *Thos. L. Michie*, for appellee.

HOBSON, C. J. Appellee recovered a verdict for \$4,000 against appellant for personal injuries received by him while a passenger on one of its cars. The proof is very conflicting. The proof on his behalf is to the effect that he, with two companions, got on the street car to come home; that they stood on the rear platform of the car, and the conductor there took up their fares. Soon after this, when the car was turning a corner, the lurch of the car caused appellee to throw out his hand, and when it came in contact with the controller box he received a shock of electricity which caused him to fall to the floor. He was unconscious until the next morning. His arm was paralyzed. His hand was clenched so that he could not open it, and, as one of the witnesses expressed it, the arm was dead. It was some weeks before this condition passed away. At the end of that time the muscles

*As to the degree of care required of a carrier of passengers, see foot-notes appended to *Topp v. United Rys. & Electric Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683; *Foster v. Seattle Electric Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1; *Logan v. Metropolitan St. Ry. Co.* (Mo.), 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753.

†See foot-note appended to preceding case.

South Covington & C. St. Ry. Co. v. Smith

were relaxed so that he had no strength in the arm. For a while he improved, but at the trial he had about one-fifth of the strength in the arm that he had before, and the doctor who had attended him was unable to say whether the injury would be permanent or not. This was some months after he was hurt. He suffered a great deal from the injury. For a while he could not work at all, and his capacity to earn money was reduced from \$9 to \$7 a week at the time of the trial. He still suffered very much at times, and was very nervous. The proof for the plaintiff also tended to show that the car was in bad condition, and that this was known to the defendant, and unknown to him; that regularly there should have been no electricity about the controller box; that it was a rainy day; and when the car floor was wet, and a man's shoes were wet, there would be more danger from a shock than under other conditions. On the other hand, the proof for the defendant showed that the car was in good condition, and had not been out of order; that there was no electricity about the controller box, and that the plaintiff simply fell down from a fit or some other sudden malady; that he had a weak heart, and that he was otherwise in a normal condition at the time of the trial. The evidence was such that the court properly left the case to the jury, and under all the facts and circumstances we cannot say that their verdict is flagrantly against the evidence, or that the amount of the recovery is so large as to justify us in disturbing it on the ground of passion or prejudice.

The chief complaint is that the court erred in his instructions to the jury. By instruction "a" given on the motion of the plaintiff, the court told the jury, among other things, that they should find for the plaintiff if "the defendant failed to use the utmost care to prevent such electric current from being in said controller box"; but by instruction 3 given on the motion of the defendant the court also instructed the jury that if they believe from the evidence "that the defendant used the utmost care and skill ordinarily used by persons in the same or similar business of carrying passengers" to prevent and guard against such injuries as plaintiff complained of receiving, they should find for the defendant. The two instructions must be read together, and, when so read, fairly present the law of the case. At least appellant cannot complain, as the third instruction was given on its own motion. Appellant also complains that the court by its instructions allowed the jury to find for the plaintiff, among other things, his expenses for medical attention, without limiting them to \$200, the amount alleged by the plaintiff in his petition to have been expended for medical attention. Appellant could not have been prejudiced by this, as the proof showed that the doctor's bill was \$200, and there was no other evidence on the subject.

There was evidence of negligence on the part of the defendant. But if it be conceded that the witness who testifies to the car being out of order when sent out on the road was successfully contradicted, still, if the controller box was charged with electricity to such an extent as to endanger the safety of the passengers who

Southern Pac. Co. v. Maloney

might accidentally touch it by any cause, the jury would be warranted in inferring from this fact negligence on the part of the defendant. It is the duty of the carrier to have his vehicles safe, and, if they are unsafe, negligence may be presumed. A vehicle is unsafe when the passenger may receive a deadly charge of electricity by coming in contact with a part of the vehicle which he is liable to touch while being carried. If the jury believed from the evidence that the plaintiff received the shock of electricity from touching the controller box, inflicting on him the injury complained of, they might properly find for the plaintiff, and whether the controller box was in fact charged with electricity and the plaintiff was in fact injured by coming in contact with it were questions that were fairly submitted to the jury by the instructions of the court. The question of contributory negligence on the part of the plaintiff was also for the jury under the proof, and was fairly submitted to the jury by the instructions.

Judgment affirmed.

SOUTHERN PAC. CO. v. MALONEY.

(Circuit Court of Appeals, Eighth Circuit, March 4, 1905.)

[136 Fed. Rep. 171.]

Trial—Direction of Verdict—Question for Jury.*—In an action by a passenger against a railroad company, based on the alleged act of a train employee in wrongfully taking plaintiff's satchel when she was on a journey, and stealing therefrom her purse, containing all her money, where there was evidence to support such allegation, the loss of the money alone was sufficient to sustain the action of the court in refusing to direct a verdict for defendant without regard to the proof in respect to her claim for other damages.

Error—Review—Instructions.—Where no exception was taken to that portion of the court's charge defining the elements of damages to be considered by the jury, and no further instruction on the subject was requested, an assignment of error based on that given cannot be considered by the appellate court.

Same—Amount of Recovery—Conclusiveness of Verdict.—In the federal appellate courts, where no error of law appears upon the record, a verdict is conclusive in respect of the amount of damages.

Same—Matters Not Reviewable—Ruling on Motion for New Trial.—Rulings on motions for new trial are not reviewable in the federal courts because made in the exercise of the sound discretion of the trial court.

In Error to the Circuit Court of the United States for the District of Nebraska.

Sarah Maloney, being possessed of a ticket entitling her to be carried as a passenger over the railroad of the Southern Pacific Company from Ogden, Utah, to San Francisco, California, and desiring to take a train which was standing at the company's

*See generally, the foot-note appended to *Wood v. Maine Cent. R. Co. (Me.)*, 9 R. R. R. 721, 32 Am. & Eng. R. Cas., N. S., 721.

Southern Pac. Co. v. Maloney

station at Ogden, between 1 and 2 o'clock in the morning, and was about to start to San Francisco, made inquiry of a colored porter connected with that train respecting the location of the chair car, whereupon the porter offered to show her to the car, took her satchel, and conducted her into a nearby car, which was not part of the San Francisco train, and was not lighted. He then hastily departed with the satchel, and almost immediately the car was moved about 500 feet away from the San Francisco train, and out into the station yards. Mrs. Maloney alighted from the car, returned to the station, and made complaint of the loss of her satchel and its contents, which included her purse, her railroad ticket, and between \$19 and \$20, which was all the money she had. Shortly thereafter the satchel was found and was returned. The money was also found on the person of the porter, but was not returned. The purse and ticket were not found, and were not returned. After some further inconvenience resulting from the loss of her ticket and money, Mrs. Maloney started for San Francisco on one section of the train which she at first intended to take. She was not provided with another ticket, but an order to carry her without a ticket was delivered to the conductor, who failed to hand it to the next conductor, and during the journey Mrs. Maloney had considerable difficulty in inducing the several succeeding conductors to permit her to proceed without a ticket. Money to pay for her meals en route was provided by other passengers, whom she did not know before. The action in the court below was brought by Mrs. Maloney to recover from the Southern Pacific Company the damages resulting from the wrongful acts of the porter. The petition alleged, and there was evidence tending to show, in addition to what is before stated, that the wrongful acts of the porter put her in fear and caused her mental suffering, but no objection appears to have been made to the introduction of this evidence. There was a verdict for the plaintiff assessing her damages at the sum of \$2,500, which, by her permission, was reduced to \$1,500, and judgment was given in her favor for that amount.

John N. Baldwin and *Edson Rich*, for plaintiff in error.

C. J. Smyth (*Ed. P. Smith*, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is complained that the court denied the defendant's request for a directed verdict in its favor; that the court instructed the jury that the defendant was liable for the "damages naturally resulting" to the plaintiff from the wrongful acts of the porter, thereby permitting damages to be awarded for mere inconvenience, fright, and mental suffering; that the damages awarded are excessive; and that the court denied the defendant's motion for a new trial.

Southern Pac. Co. *v.* Maloney

In support of the contention that there should have been a directed verdict, it is said that the petition failed to allege, and the evidence failed to show, any substantial injury to the plaintiff, and that, therefore, there was nothing upon which a verdict in her favor could be properly rested. The contention is not well taken. The petition alleged and the evidence established that the porter wrongfully took the plaintiff's money, and she was entitled to a verdict for that amount, no matter what view should have been taken of her claim to damages in other respects.

Nor was there error in the instruction that the defendant was liable for the "damages naturally resulting" from the wrongful acts of the porter. While the language used was quite general, and not calculated to convey to the jury a very definite idea of what could be considered by them in assessing the damages, it stated the law correctly as far as it went, and, if the defendant desired that the jury be more particularly instructed upon that subject, it should have prepared and presented an instruction embodying correct legal propositions applicable to the state of the evidence, and have requested that it be given. This was not done. The record, however, discloses that the subject was not left in the condition suggested by the instruction complained of, but that in the succeeding portion of the charge the court defined with particularity the elements of damage which the jury should consider. No objection was made or exception taken to that part of the charge. It was therefore assented to, and its correctness is not now open to consideration.

In the federal appellate courts, where no error of law appears upon the record, a verdict is conclusive in respect of the amount of damages. *Railroad Co. v. Froloff*, 100 U. S. 24, 31, 25 L. Ed. 531; *Ash v. Prunier*, 44 C. C. A. 675, 678, 105 Fed. 722; *Metropolitan Street R. R. Co. v. Beattie*, 50 C. C. A. 472, 111 Fed. 945. And in those courts rulings upon motions for new trial are not reviewable, because such a motion is addressed to the sound discretion of the court. *Railway Co. v. Heck*, 102 U. S. 120; *McClellan v. Pyeatt*, 1 C. C. A. 613, 50 Fed. 686; *City of Manning v. German Insurance Co.*, 46 C. C. A. 144, 107 Fed. 52; *Walker v. Moser*, 54 C. C. A. 262, 117 Fed. 230.

The judgment is affirmed.

COLEMAN *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 9, 1905.)

[50 S. E. Rep. 690.]

Passengers—Schedule as Offer to Transport on Next Train.*—Under Code, § 1963, providing that railroads shall run their passenger trains at regular times, to be fixed by public notice, shall furnish sufficient accommodations for passengers, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises, the schedule of trains is an offer, which, when accepted by a person by asking for a ticket, gives him a legal right to be transported by the first train stopping at his destination.

Same—Refusal to Sell Ticket for Next Train—Defenses—Mistake or Negligence.†—Where defendant's ticket agent was asked to sell plaintiff a ticket on the next local train, and the demand was refused on the ground that a ticket could not be sold until a through train, which the agent erroneously stated was ahead of the local, had passed, it was immaterial to the rights of the plaintiff to recover for damages suffered in consequence of the refusal whether it was the negligence of the ticket agent, or whether he was misled by the negligence of some other agent.

Same—Same—Same.—A subsequent announcement by the agent in the station that the local had arrived did not excuse the misinformation which had been given, when not brought to the knowledge of the plaintiff.

Burden of Proof.—The burden was on defendant, in an action for damages resulting from its negligence, to show that it gave plaintiff correct information in time to enable him to take the local.

Refusal to Sell Ticket for Next Train—Negligence—Question for Jury.—In an action against a carrier for damages occasioned by defendant's refusal to sell plaintiff a ticket on the next train to plaintiff's station after the demand, evidence examined, and whether defendant was guilty of negligence held a question for the jury.

Witnesses—Impeachment.—Evidence that a witness had been convicted of forcible trespass is admissible to impeach him.

Same—Same.—Where a witness was asked if he had been charged with larceny, for the purpose of impeaching him, his denial was conclusive.

Brown, J., dissenting in part.

*For the authorities in this series on the subject of passenger schedules and time tables, see *Van Camp v. Michigan Cent. Ry. Co.* (Mich.), 13 R. R. R. 260, 36 Am. & Eng. R. Cas., N. S., 260 (application of Michigan statute, providing for penalties for failure to run passenger trains according to published schedules, as affected by fact that sale of ticket resulted from failure to send notice to agent of withdrawal of certain train); foot-note appended to *State v. Cleveland, etc., Ry. Co.* (Ind.), 23 Am. & Eng. R. Cas., N. S., 336 (liability of a carrier of passengers for failure to publish or observe schedules).

†As to the responsibility of the carrier for mistakes or negligence of its ticket agent, see *Chiles v. Southern Ry. (S. Car.)*, 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750 (exemplary damages for refusal of ticket and demand of extra fare by conductor, who knew that ticket agent had made a mistake); *Indianapolis St. Ry. Co. v. Wilson* (Ind.), 7 R. R. R. 841, 30 Am. & Eng. R. Cas., N. S., 841 (duty of conductor to accept passenger's explanation in regard to transfer given him by agent through mistake); *Illinois Cent. R. Co. v. Harper* (Miss.), 10 R. R. R. 612, 33 Am. & Eng. R. Cas., N. S., 612 (duty of conductor to listen to explanation of passenger on wrong train through mistake of ticket agent); *Memphis St. Ry. Co. v.*

Coieman v. Southern Ry. Co

Appeal from Superior Court, Mecklenburg County; O. H. Allen, Judge.

Action by Charles Coleman against the Southern Railway Company. From the judgment, plaintiff appeals. Reversed.

A. B. Justice, for appellant.

W. B. Rodman, for appellee.

CLARK, C. J. On 5th February, 1905, about 8:30 A. M., the plaintiff went to the defendant's station in Concord to take the south-bound train for Harrisburg. Two south-bound trains were, according to schedule, expected soon thereafter. The first, which had been due since 7:23 (No. 33), was a through train, which did not stop at Harrisburg. The other (No. 11), due at 9:10, was a local passenger train, which did stop there. The plaintiff went to the ticket window and asked for a ticket. The agent told him the through train was ahead, and he could not sell him a ticket on the local train till the through train had passed.

Graves (Tenn.), 8 R. R. R. 505, 31 Am. & Eng. R. Cas., N. S., 505 (negligence in giving defective transfer); Kansas City, M. & B. R. Co. v. Foster (Ala.), 5 R. R. R. 609, 28 Am. & Eng. R. Cas., N. S., 609 (liability for act of ticket agent in selling ticket to place where yellow fever was prevalent); St. Louis, etc., Ry. Co. v. Wilson (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793 (liability for refusal to unlock station room); note, 10 Am. & Eng. R. Cas., N. S., 274 (mistakes of ticket agents); note, 17 Am. & Eng. R. Cas., N. S., 655 (acts or omissions of ticket agents with respect to stamping and identification); Krantz v. Rio Grande Western R. Co. (Utah), 2 Am. & Eng. R. Cas., N. S., 432 (failure of ticket agent to protect person in station from assault); Atkinson v. Southern Ry. Co. (Ga.), 23 Am. & Eng. R. Cas., N. S., 651 (right to recover for failure to stop train at station where passenger relied on statement of ticket agent); Southern Ry. Co. v. Wood (Ga.), 23 Am. & Eng. R. Cas., N. S., 555 (liable for ejection of passenger for failure to have round-trip ticket stamped where ticket agent could not be found); Spink v. Louisville & N. R. Co. (Ky.), 16 Am. & Eng. R. Cas., N. S., 86 (giving passenger wrong ticket); Louisville & N. R. Co. v. Hine (Ala.), 14 Am. & Eng. R. Cas., N. S., 382 (ejection of passenger caused by mistake of ticket agent). See also, Alabama & V. Ry. Co. v. Holmes (Miss.), 10 Am. & Eng. R. Cas., N. S., 270; Atlanta Consol. St. R. Co. v. Keeney (Ga.), 5 Am. & Eng. R. Cas., N. S., 305, 308; Ellsworth v. Chicago, Burlington, etc., R. Co. (Iowa), 2 Am. & Eng. R. Cas., N. S., 80; Louisville & N. R. Co. v. Gaines (Ky.), 5 Am. & Eng. R. Cas., N. S., 226; Courts v. Louisville & N. R. Co. (Ky.), 5 Am. & Eng. R. Cas., N. S., 223 (mistake of ticket agent); McGhee v. Reynolds (Ala.), 10 Am. & Eng. R. Cas., N. S., 49 (agent's refusal to sign ticket a good cause of action in tort); Hanlon v. Illinois Cent. R. Co. (Iowa), 16 Am. & Eng. R. Cas., N. S., 101 (authority of ticket agent); Coyle v. Southern Ry. Co. (Ga.), 20 Am. & Eng. R. Cas., N. S., 529 (authority of ticket agent to waive limitations on ticket); Gulf, C. & S. F. Ry. Co. v. Moorman (Tex.), 11 Am. & Eng. R. Cas., N. S., 157 (carrier chargeable with notice that person is acting as ticket agent); Southern Ry. Co. v. Marshall (Ky.), 23 Am. & Eng. R. Cas., N. S., 82 (carrier estopped to deny authority of clerk assuming to be general passenger agent); Scott v. Cleveland, C., C. & St. L. R. Co. (Ind.), 3 Am. & Eng. R. Cas., N. S., 428; Louisville & N. R. Co. v. Breckinridge (Ky.), 3 Am. & Eng. R. Cas., N. S., 428 (ejection of passenger caused by mistake of ticket agent).

Coleman v. Southern Ry. Co

The plaintiff then went out and looked at the bulletin board, and found that the local train would come in first. He went back and told the agent, who replied that the bulletin was wrong, and that the through train had gotten ahead. The agent testified that: "When I saw No. 11 come in first, I stepped out of my office door and hollered out that No. 11, the local train, was ahead, and stepped back in my office and got my mail to put in the baggage car. There wasn't any one at the ticket window." He further said that the plaintiff was not present at that time. He does not testify that he made any effort to find the plaintiff and correct his refusal to sell him a ticket by the train first arriving. The plaintiff testified that he went out on the platform, and was there when the train arrived; that the agent was then in three feet of him, but gave him no information that his was the local train, and, relying upon the twice-given information that this was the through train, and having no ticket, he did not try to get aboard. But he and the agent both say that, as soon as the first train left, the plaintiff went to the agent again to buy a ticket, when he was told that the local train had passed. He was told that he could get a ticket to Harrisburg by the local freight train, but he could not learn what time it would leave, but it did leave about 12:30. About 10:30 the agent closed the station and put the plaintiff out, though he asked to be allowed to remain, and he stood around in the cold on his crutch and cane till the 12:30 train left, on which the plaintiff went to Harrisburg. The plaintiff's positive testimony that he was thus put out is not denied by the defendant's witnesses, for Kimball swore that "he did not remember the occurrence of that morning," and was not ticket agent at that time, and "did not know anything about the facts that Coleman had testified to, of his own knowledge"; and Carson, when asked if he put Coleman out, replied, "Not that I remember," adding he thought he would have recollected it. He also says that he closed the office and left after the 10:30 train passed, going north, and that the plaintiff applied to him again for a ticket after No. 11 had passed. He bought his ticket before the office was closed. Neither of these witnesses could recall the weather that day. Other witnesses for the defendant, on cross-examination, corroborated the plaintiff as to his being on crutches and complaining at the time of the refusal to sell him a ticket. There is evidence that he had a burn on his leg, necessitating the use of the crutch and cane, in which sore he took cold by reason of being turned out of the station, and suffered serious injury from his exposure, and great pain for many weeks.

It goes without saying that this is a case of grave disregard of the rights of one of the traveling public. The defendant is not a person or private corporation which can do business when and with whom it pleases, but it is in the enjoyment of a very profitable public franchise, which it can only exercise by reason of a grant from the public of the right of eminent domain, and subject to control of its rates and management by the state, and even

Coleman v. Southern Ry. Co

to a repeal of its franchises at the will of the Legislature. Const. art. 8, § 1. Code, § 1963, provides that "every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation * * * and shall be liable to the party aggrieved in an action for damages for any neglect or refusal." It was not optional with the defendant whether and when it should transport the plaintiff, like a merchant selling goods. The printed schedule is an offer, which was accepted by the plaintiff when he asked for a ticket, and he had a legal right to be transported by the first train stopping at Harrisburg. If the train arrives after schedule time, or misses connection, or delivers a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for his loss of time and actual expenses. This has been often held. *Purcell v. Railroad*, 108 N. C. 417, 12 S. E. 954, 956, 12 L. R. A. 113, cited and affirmed in *Hansley v. Railroad*, 117 N. C. 570, 571, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600. "He can recover loss of time and expenses, such as hotel bills, incurred in waiting for the other train." 2 Sedg. Dam. § 862; 2 Harris, Dam. § 545; *Railroad v. Carr*, 71 Md. 135, 17 Atl. 1052; *Yonge v. S. S. Co.*, 1 Cal. 353; *Bishop, Noncont. Law*, §§ 74, 1059. Indeed, "the mere inconvenience" is ground for damage. *Railroad v. Carr*, supra, and cases there cited. In *Railroad v. Birney*, 71 Ill. 391, *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588, and *Purcell v. Railroad*, supra, the plaintiff recovered damages because the train, scheduled to stop at that station, ran by without stopping. In *Sears v. Railroad*, 94 Mass. (12 Allen) 433, *Railroad v. Bonaud*, 58 Ga. 180, and *Denton v. Railroad*, 5 Ellis & B. 860, the plaintiff recovered damages because he went to the station to take a train scheduled to leave at that hour, but which did not go out. There are many similar cases. 5 Am. & Eng. Enc. (2d Ed.) 585.

In the present case the plaintiff twice applied for a ticket by that train, and was refused. We are not called upon to question the rule that tickets should be sold only for the next train. Here the agent refused to sell the plaintiff a ticket for the "next train." It is immaterial to him whether this was the negligence and indifference of this particular agent, or whether he was misled by the negligence of some other agent of the defendant. The plaintiff had a right to rely upon his representation. *Railroad v. Atchison*, 47 Ark. 74, 14 S. W. 468; 1 Fetter on Passengers, § 305. There is no evidence that the agent tried to seek out the plaintiff and correct the error, nor that the plaintiff heard the announcement (if made) in the waiting room. Indeed, the announcement, according to the agent's testimony, was only made

Coleman v. Southern Ry. Co

after he saw the train come in, and he did not go back to the ticket window, and there was no opportunity for the plaintiff to get a ticket if he had been present. The testimony of the defendant is that the plaintiff went off towards Cannon's Mill, but this apparently was after he was refused a ticket by the second train. Both the plaintiff and the agent concur that, immediately after No. 11 left, the plaintiff a third time applied for a ticket. The agent testified that the plaintiff was not present when he made his hurried announcement that No. 11 had arrived. There was no reason he should be, after the agent's statement that he could not get a ticket "till the next train had passed"; and it is admitted that, immediately after the first train passed, he did come up and ask for a ticket "by the next train."

The charge of the court that "if afterwards the agent made the announcement [that No. 11 had arrived] in the station, where passengers had a right to be at that time, and the plaintiff either did not hear him or was absent, and did not apply for a ticket accordingly after his announcement was made, then the defendant could not be guilty of negligence," was clearly error. The plaintiff was not required to be in the waiting room, since he could not get a ticket till after the first train passed, and an announcement then could not cure the misinformation given to the plaintiff, unless the correction was brought to his knowledge. The agent's testimony is that it was not, for he says the plaintiff was not there.

The court further erred in telling the jury that the burden upon this point was upon the plaintiff. He charged immediately after the above quotation: "So that it becomes important, in the beginning, to ascertain how it was. The burden is upon the plaintiff. The burden is upon him to show this by the greater weight of the evidence." The agent having, upon his own testimony, given the misinformation which misled the plaintiff, and refused to sell him a ticket, the burden was upon the defendant to show that he gave to the plaintiff correct information in time to enable him to take the train.

Further, when the agent had knowledge that the plaintiff had thus missed his train, the plaintiff had a right to remain in the station and be kept comfortable till the next train left. It was brutality, against the plaintiff's protest, to turn him out in the cold, with a recent wound, when the agent saw he was leaning on his crutch and cane, and knew that by his misinformation the plaintiff had been left there, more especially if it is true, as the plaintiff testified, that the freight depot was also closed, and the doors of the passenger coach on the local freight train were locked; and, not knowing when it would leave, he could not go on his crutch and cane back to the town, which is some distance off, for shelter. For such tort he is entitled to reasonable and just damages for any injury of which such conduct was the proximate cause, and the plaintiff is entitled, upon the defendant's own testimony, to have this inquired of by a jury. The

Coleman v. Southern Ry. Co

plaintiff may be a humble individual, and the damages may or may not turn out to be slight. But in the history of English law, many important rights have been declared in similar instances of obscure complainants, and where the wrong was not of great note by reason of its effect in that particular case.

For this disregard of the rights of the plaintiff to be transported by the first train, and not to be turned out into the inclement weather from the defendant's waiting room after having been thus misled by its agent into losing his train, he has no remedy but in the courts of his country. It is the good fortune of the defendant that its liability for the misconduct of its agent in turning out a passenger entitled to its protection should be declared in a case where the consequences of such misconduct did not prove more serious, as in many cases they might be, as where the delayed passengers are infirm, feeble, or women and children. The traveling public have an interest in knowing clearly what are their rights when detained beyond schedule time by delays of the train, and they have a right to know that their comfort while waiting for the next train is protected by the law. "Where a station building has been erected by a railroad company, to which passengers are invited while waiting for trains, a common-law duty rests on the company to provide reasonable accommodations for those who accept its invitation." 1 Fetter, Carriers of Passengers, § 250. This court, while holding that 30 minutes before the time scheduled for the arrival of a train might be a reasonable time to open a waiting room, added that the case would be different with through passengers and delayed trains. *Phillips v. Railroad*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163. It is neglect of duty to allow the waiting room to become uncomfortably cold (2 Wood on Railroads, 1165), or to fail to keep it lighted (Bishop, Noncontract Law, § 1086). In *Railroad v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720, where the plaintiff was detained at the station by the train being delayed, the court held that she could recover for injury to her health caused by the fire being permitted to go out. The railroad company is liable to passengers waiting for a train for injuries sustained from failure to keep its waiting room comfortably heated. *Boothly v. Railroad*, 66 N. H. 342, 34 Atl. 157. For a stronger reason, the plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him the ticket, can recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train, and possibly for the indignity of such treatment, under these circumstances, also.

The plaintiff was not afforded an opportunity to have his testimony either credited or discredited by the jury, for, when the judge told them that if, after refusing to sell the plaintiff a ticket, the defendant's agent afterwards announced the arrival of the train at the station, and "the plaintiff either did not hear him or was absent" (neither of which the plaintiff denied), and ac-

St. Louis, etc., Ry. Co. v. Marshall

cordingly did not buy a ticket, "the defendant could not be guilty of negligence," he effectually withdrew the case from the jury. This is the chief error—that the jury was not allowed to pass upon the controversy by reason of this erroneous instruction.

It was competent, to impeach the plaintiff, to show by him that he had been convicted of forcible trespass. His denial that he had been charged with larceny was conclusive, and it was incompetent to introduce contradictory evidence. The defendant's brief opens with reference to the plaintiff having received the burn on his leg while drinking. This could hardly have been competent to impeach his veracity, and still less was it competent (as the prominence given it seems to indicate) as a defense of the wrong done him by the defendant in turning him out, regardless of the weather, to hobble around on his crutch and cane. The state had punished him for his violation of law, and possibly the burn was punishment enough for the drinking. Certainly the defendant had no jurisdiction to add further punishment by exposure to the weather. He was not outlawed. He had offered and paid his money for transportation over the defendant's road, and was entitled, under the law, to as good treatment at its hands as any one else.

Error.

ST. LOUIS, I. M. & S. RY. CO. v. MARSHALL.

(Supreme Court of Arkansas, April 1, 1905.)

[86 S. W. Rep. 802.]

Carriage of Freight—Duty to Furnish Cars.*—A carrier must furnish suitable and proper cars for a shipment.

Same—Same—Defect—Injury on Another Line—Liability.*—If a carrier fails to furnish proper cars for a shipment and injury results to the goods from a defect in the car, the carrier is liable, although the injury may have occurred beyond such carrier's line.

Same—Defective Car—Inspection by Shipper—Liability.†—Where a carrier furnishes a defective car for a shipment, it is liable for in-

*As to the liability of a carrier for injury to freight caused by defects in cars, see note appended to New York, etc., R. Co. v. Cromwell (Va.), 17 Am. & Eng. R. Cas., N. S., 328; note appended to Chicago & A. R. Co. v. Davis (Ill.), 2 Am. & Eng. R. Cas., N. S., 581; note appended to Leonard v. Whitcomb (Wis.), 7 Am. & Eng. R. Cas., N. S., 520; Louisville & N. R. Co. v. Queen City Coal Co. (Ky.), 4 Am. & Eng. R. Cas., N. S., 389; Savannah, etc., R. Co. v. Booth (Ga.), 5 Am. & Eng. R. Cas., N. S., 612; Chicago, B. & Q. R. Co. v. Williams (Neb.), 21 Am. & Eng. R. Cas., N. S., 175; Davis v. Texas & P. Ry. Co. (Tex.), 10 Am. & Eng. R. Cas., N. S., 301; Corso v. New Orleans, etc., Co. (La.), 5 Am. & Eng. R. Cas., N. S., 43 (connecting carriers); Shea v. Chicago, R. I. & P. Ry. Co. (Minn.), 68 N. W. 608, 5 Am. & Eng. R. Cas., N. S., 695 (using defective car of connecting carrier); Olson v. Pennsylvania & O. Fuel Co. (Minn.), 15 Am. & Eng. R. Cas., N. S., 837 (liability of carrier transferring car over connecting lines).

†See extensive note, 9 R. R. R. 6, 32 Am. & Eng. R. Cas., N. S., 6; note, 7 Am. & Eng. R. Cas., N. S., 525 (whether shipper chargeable with knowledge of small defects).

St. Louis, etc., Ry. Co. v. Marshall

juries to the shipment resulting from such defect although the shipper inspected the car and knew of the defect.

Same—Agreement Fixing Measure of Damages—Validity.‡—In the absence of express consideration therefor, a provision in a contract of shipment fixing the market price at point of shipment instead of at point of delivery as the measure of damage in case of injury to the shipment is void.

Appeal from Circuit Court, Lee County; Hance N. Hutton, Judge.

Action by D. B. Marshall against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The appellee, Marshall, desired to ship potatoes to Cleveland, Ohio, and applied to the station agent of the appellant railroad company at La Grange for a ventilator car for such shipment. He was told by the agent to let him know a few days in advance of the exact time when the car was wanted, and it would be furnished. Marshall gave notice on Friday that he would want the car on the following Tuesday, and the agent promised to have it ready on that date for the shipment. Marshall then commenced digging and hauling his potatoes so as to have the car load ready on that date. On Monday night a car was brought into La Grange for Marshall. It was a cattle car, in bad order, and too small. Marshall told the agent it would not do, and the agent told him that he would have another one brought from Helena the next day, which would be the kind wanted. The car arrived the next day, and was not a ventilator car, but a Canada cattle car, and the roof was broken and defective, and the floor covered with manure. Marshall called the attention of the agent to its condition and unfitness for the shipment, and asked for another car. The agent told him he could not get another car in less than two weeks. The potatoes were then ready for shipment, and the weather was warm, it being the 26th of June, and they would not keep. Marshall cleaned the floor and patched the roof as best he could, and then loaded his potatoes into the car, but after his work the roof and bottom of the car was still in bad condition. The potatoes were in good condition when shipped. The car was hauled by appellant to St. Louis, and then delivered to a connecting carrier, and it was hauled to Cleveland by the connecting carrier, and delivered to the consignee on the 1st of July. The potatoes were in bad order when received in Cleveland, and the uncontroverted evidence is that their damaged condition was due to the car having passed through rainstorms in transit, and, owing to the defective roof, the potatoes were rained upon, and that, with the manure in the bottom, caused them to rot. They were sold at once to the best advantage, and brought less than if they had reached Cleveland in good order. This suit is for the difference in the amount received

‡See foot-notes appended to *Cau v. Texas & Pac. Ry. Co.* (U. S.), 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303.

St. Louis, etc., Ry. Co. v. Marshall

and what would have been received had they been delivered in good order. The plaintiff, Marshall, recovered. If the Cleveland market is to govern, the verdict is supported by the evidence. If the La Grange market is to govern, there is a controversy as to whether the verdict is excessive. The appellant introduced the bill of lading, which is in usual form, and contains these clauses: "And it is further especially understood that for all loss or damage occurring in the transit of said property, the legal remedy shall be against the particular carrier only in whose custody the said property may actually be at the time of the happening thereof; it being understood that St. Louis, Iron Mountain and Southern Railway Co. in receiving the said property to be forwarded as aforesaid assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. * * * In the event of loss of property under the provisions of this agreement, the value or cost of the same at the point of shipment shall govern the settlement."

B. S. Johnson, for appellant.

P. D. McCulloch, for appellee.

HILL, C. J. (after stating the facts). The uncontroverted evidence is that the defective and unsuitable car was the cause of the injury to the potatoes. The appellant contends that there is no evidence of injury upon its line from La Grange to St. Louis, and that its obligation ceased when the goods were delivered to the connecting carrier, and that, in the absence of evidence, the presumption is that the last carrier is the responsible carrier. In answer to a similar contention in *St. Louis, Iron Mountain & Southern Ry. v. Coolidge*, 73 Ark. —, 83 S. W. 333, the court said: "If the evidence is sufficient to show negligence in the appellant as the initial carrier which caused the injury, then the presumption is overcome." The carrier must furnish suitable and proper cars for the purposes of the shipment. 4 Elliott on Railroads, § 1475. If the carrier fails to furnish proper cars, and damage results from the defect in the car, then the carrier who furnished the defective car is liable, although the actual injury may have occurred beyond its line. *Indianapolis, etc., Ry. v. Strain*, 81 Ill. 504; *Ala. & Vicksburg Ry. v. Searles*, 71 Miss. 744, 16 South. 255; *Searles v. Ala. & Vicksburg Ry.*, 69 Miss. 186, 13 South. 815; 4 Elliott on Railroads, § 1448, and notes. This is true although the shipper may have inspected the car before its acceptance, and was aware of its condition. The Supreme Court of the United States thus stated this proposition: "It is said that Pratt was aware of the defective condition of the car; that he voluntarily made use of it, and that the risk of loss by its use thus became his and ceased to be that of the company. The judge charged the jury that it was the duty of the carrier to furnish suitable vehicles of transportation; that, if he furnished unfit or unsafe vehicles, he is not exempted from responsibility by the fact that the shipper knew them to be defective, and used

St. Louis Southwestern Ry. Co. v. Highnote

them; and that nothing less than a direct agreement by the shipper to assume the risk would have that effect. * * * The authorities sustain the position taken by the judge at the trial. * * * The judge at the trial in this case might have gone much further than he did, and charged that, if the jury found the company to have been negligent and careless in furnishing cars, they would not be relieved from responsibility, although there had been an agreement that they should not be liable therefor." *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827. This doctrine was approved in *Ry. v. Lesser*, 46 Ark. 236, and other authorities there cited.

The clause in the contract fixing the market at the point of shipment instead of the point of delivery as the measure of damage was passed upon in *Ry. v. Coolidge*, supra, where it was held that the clause was void unless there was a consideration for it.

The judgment is affirmed.

McCULLOCH, J., being disqualified, did not participate.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. HIGHNOTE.

(Supreme Court of Texas, May 8, 1905.)

[86 S. W. Rep. 923.]

Injury to Passenger—Alighting from Moving Train—Effect of Agreement with Conductor.*—One riding on a train under a special agreement with the conductor that the train would slack up enough for him to alight with safety at a certain place cannot hold the railroad responsible for injuries sustained in alighting from the train at the place agreed upon, where he acted upon his own motion and judgment, without the knowledge or concurrence of the conductor, at a time when the train was in fact going too fast to permit him to alight in safety, although he used ordinary care in judging and determining that it was safe for him to alight.

Same—Ordinance Limiting Speed—Application.†—A municipal ordinance limiting the speed of trains within the city to six miles per hour is for the protection of persons who are lawfully upon or crossing the track of the railroad, and a violation thereof by the railroad does not constitute negligence with reference to passengers upon a train who leave the same while it is in motion.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by H. P. Highnote against the St. Louis Southwestern Railway Company of Texas. There was a judgment of the Court

*For the authorities in this series on the subject of the contributory negligence of passengers alighting from moving cars or trains, see foot-notes appended to *Flaherty v. Boston & M. R. Co.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; foot-note appended to *McDonald v. City Electric Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436.

†See generally, foot-notes appended to *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643.

St. Louis Southwestern Ry. Co. v. Highnote

of Civil Appeals affirming a judgment for plaintiff (84 S. W. 365), and defendant brings error. Reversed.

See, also, 74 S. W. 920.

E. B. Perkins and *Frost & Neblett*, for plaintiff in error.

Richard Mays, for defendant in error.

BROWN, J. We adopt the following statement from the opinion of the Court of Civil Appeals:

"The appellee sued appellant to recover damages for personal injuries alleged to have been occasioned by the negligence of appellant's servants. Appellant answered by demurrers, contributory negligence, and assumed risk. Judgment in favor of appellee. The evidence shows that in December, 1901, the conductor of one of appellant's east-bound passenger trains, at Corsicana, agreed to carry appellee and one Martin, another policeman, out about the East Side Schoolhouse in said city; they being on the lookout for pickpockets. The conductor agreed that he would slack up enough for them to get off with safety at the place mentioned, and he so informed the engineer of this arrangement. Before reaching the place agreed upon, Martin jumped off. Appellee went down on the steps of the coach, and, concluding that the train was running too fast for him to alight in safety, returned within the coach and pulled the bell cord. The coach began to slow up, and when the speed had reached its lowest, as appellee thought, he alighted from the train, and was injured. At the time he alighted the train was running at a speed of more than six miles an hour, and too fast to alight in safety; but it was a dark night, and appellee could not tell, and thought it was safe to do so. An ordinance of the city of Corsicana made it a penalty for operators of trains to run faster than six miles an hour within the corporate limits. The conductor was not present when appellee alighted, and had no knowledge of his going to alight further than shown by the agreement that he would slack up at that point."

Plaintiff in error complains of the following paragraphs of the charge given by the court to the jury:

"If the plaintiff was on the train under an arrangement with the conductor, as alleged, he was rightfully on the train, and it was the duty of the conductor to use reasonable diligence and care to carry out the agreement, and to afford plaintiff an opportunity to safely alight, provided he himself should exercise reasonable care in the choosing of the occasion and in the doing of the act. Such arrangement would not bind the conductor to make the exit of the plaintiff safe, but only by reducing the speed of the train, if it was going too fast, to give the plaintiff what reasonably appeared to the conductor a chance to get off in safety in the use of ordinary care on plaintiff's part."

"If the speed of the train was too fast for a person of ordinary prudence to undertake to alight, and if plaintiff did not know nor believe it was going too fast for him to safely alight, his want of

St. Louis Southwestern Ry. Co. v. Highnote

knowledge or belief did not excuse his act unless he used ordinary care in judging and determining, and did in fact reasonably believe that the train had been slowed up for him to get off, and that its speed was such that he could safely do so."

The effect of the foregoing charges was to inform the jury that the plaintiff had the right to choose the time and place of his departure from the train without the knowledge or concurrence of the conductor. By the terms of these charges the conductor was eliminated altogether from the transaction, and the railroad company was made liable for the mistake of the plaintiff, provided only that he used reasonable care in choosing the place, the manner of leaving the train, and in determining as to the speed at which the train was running. In other words, under the two charges the plaintiff could recover if he used ordinary care in determining whether or not he had arrived at the proper place for disembarking, and if he used due care in determining that the train was running at a safe speed for him to alight, although the conductor might have thought (and he testified that he did) that the speed of the train was too great for safety in leaving it. In adopting that theory of the case the honorable district court committed error. The plaintiff himself swore that the conductor was not present when he jumped from the train; that he did not consult him with regard to the propriety of so doing, and had no advice or invitation from any person to depart at that time and place, but for himself he decided that the train was running slow enough to justify him in jumping from it to the ground. He acted strictly upon his own judgment in so doing, and the railroad company cannot be held liable for the results which flowed from such acts. The plaintiff, by his own testimony, was guilty of contributory negligence in the act of alighting from the train. Thompson's Carriers of Passengers, pp. 227, 228; Beach on Contributory Negligence, § 53, p. 156; H. & T. C. Ry. Co. v. Leslie, 57 Tex. 83; Penn. Ry. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; Morrison v. E. Ry. Co., 56 N. Y. 302; Burrows v. E. Ry. Co., 63 N. Y. 556; Lambeth v. N. C. Ry. Co., 66 N. C. 494, 8 Am. Rep. 508. After stating the general principles of law upon the question under consideration in the case of Railway Company v. Aspell, before cited, Judge Black stated the rule applicable to the facts in this case in the following language: "From these principles it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be left off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are extremely dangerous, especially in the dark, his friends should see that he does not travel by railroad." By his own evidence it is

St. Louis Southwestern Ry. Co. v. Highnote

shown that Highnote did not act upon the suggestion of the conductor or any trainman in the employ of the defendant. On the contrary, by using the bell he undertook to do that which, under the agreement, it was the duty of the conductor to do; that is, to cause the train to reduce its speed, and to determine when that speed had reached a safe point at which he would be permitted to leave the train. Having assumed to perform these acts himself, instead of calling upon the conductor to do so, and having, by his own judgment, determined the propriety of his act, his injury was the result of his own conduct. "There is no form of action known to the law (and the wit of man cannot invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant, but by himself." *Railway Co. v. Aspell*, supra. The fifth paragraph of the court's charge submits in different form the same theory; that is, that the plaintiff had the right to determine when and at what speed he could leave the train. Plaintiff testified that he rang the bell for the engineer to "slow up," and in response the train began to slacken its speed. But the court charged the jury, in effect, to find for plaintiff if he believed the train was being checked under the agreement for him to get off, and that it was safe for him to do so. This charge was erroneous, for the reason that it authorized the plaintiff to recover against the defendant for the results of relying upon his own act, and not upon the act or advice of the defendant or its employees in checking the train.

By the twelfth paragraph of the court's charge the jury were told, in substance, that if they believed from the evidence that the place where plaintiff leaped from the train was within the limits of the city of Corsicana, and that the train at the time was running at a speed in excess of six miles per hour, and if they further believed that the injury to the plaintiff resulted from the excessive speed of the train, he would be entitled to recover, because of the violation of the ordinance. This charge ignores the agreement to stop the train, and virtually asserts that a passenger on a train passing through the city of Corsicana may, without the knowledge of the conductor, or other employee, alight from the moving train, and, if the train be running at a speed greater than six miles per hour, the railroad company would be liable for injuries caused thereby. The general rule is that a passenger who leaves a train while in motion takes the risk of injury. There are exceptions, not necessary to be mentioned. The purpose of the ordinance was to protect persons who might be lawfully upon or crossing the track, but it has no reference to passengers upon moving trains who might wish to get off while in motion. Therefore there was no duty on the part of the defendant railway company to the plaintiff to run its train at a speed less than six miles per hour, and negligence in the violation of that ordinance cannot be imputed in favor of the plaintiff to give him a right of action for the injury received in leaving the train in that instance. *St. L. & S. W. Ry. Co. v. Pope*, 86 S. W. 5, 12 Tex. Ct. Rep. 512.

Lennon v. Illinois Central R. Co

There are many other grounds of error assigned, but it is not probable that the same questions will arise in another trial, especially in view of what we have said of the law that governs the rights of the parties. We therefore deem it unnecessary to discuss the numerous questions presented by the application.

It is ordered that the judgments of the district court and the Court of Civil Appeals be reversed, and that this case be remanded.

LENNON v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, May 3, 1905.)

[103 N. W. Rep. 343.]

Baggage—Delivery to Carrier.*—Where a railroad provided a regular and safe place at its depot for receiving baggage, and there was a safe road leading thereto, delivery of baggage to the railroad in such sense as to make it responsible for injury thereto could not be accomplished by unloading the baggage from a dray, in the absence of the station officials, onto a wheeled truck close to the edge of the platform near the track.

Same—Injury from Collision with Train—Negligence—Insufficiency of Evidence.—A passenger's baggage was unloaded from a dray onto a wheeled truck standing on the edge of the platform near the track, where it was struck by a passing train. There was no evidence that the train was being run at an unlawful rate of speed, nor that the engineer had any reason to apprehend that the dray or truck would be standing on or so near the track as to invite a collision, and it was shown that, when the engine approached sufficiently close to the edge as to make discovery of the situation possible, it was too late to check the speed of the train and avoid the collision. Held, that there was no evidence of negligence in the running of the train.

Appeal from District Court, Calhoun County; Z. A. Church, Judge.

Action to recover damage for injuries to personal property. The opinion states the case. At the close of the evidence there was a directed verdict and judgment in favor of defendant, and plaintiff appeals. Affirmed.

C. O. Longley, for appellant.

W. S. Kenyon and *E. C. Stevenson*, for appellee.

BISHOP, J. The town of Pomeroy is a station on the line of defendant's railroad. Plaintiff, an intending passenger on an early morning train from said station, procured a drayman to take his baggage, consisting of trunks, etc., to the depot. The drayman appeared at the depot with such baggage before the

*As to what constitutes delivery of baggage to a carrier of passengers, see foot-note appended to *Nashville, etc., R. Co. v. Lillie* (Tenn.), 10 R. R. R. 590, 33 Am. & Eng. R. Cas., N. S., 590.

†As to what constitutes delivery of freight to the carrier, see foot-notes appended to *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414.

Lennon v. Illinois Central R. Co

arrival of any of the station employees. He drove down immediately in front of the depot platform, and, with his team and wagon standing on the main line of track, proceeded to unload the baggage upon a wheeled truck kept on and about the platform for such purposes. While thus engaged, a fast through train announced its approach, and he had barely time to get his team and wagon out of the way before such train rushed past the depot. The truck was left standing close to the edge of the platform, and the same was caught by the passing train, and the baggage of plaintiff thereon was thrown off and injured. This action is brought to recover the amount of the damage alleged to have been thus sustained.

The petition is in two counts. The first alleges a delivery of the baggage to the defendant, and that thereafter the same was returned to plaintiff in a damaged condition. Under this count, to warrant a submission to the jury, evidence tending to show a delivery was required. We find none in the record. It appears that there was a regular and safe place provided at the depot for receiving baggage, and there was a safe road leading thereto. Whatever the rule which might, through custom or otherwise, obtain in respect of baggage placed on a truck at such place, it is manifest to our minds that, especially in the absence of the station officials, delivery could not be accomplished by leaving baggage at a place, and under circumstances of danger, such as appear in this case. *Grosvenor v. Railway*, 39 N. Y. 34; *Heiss v. Railway*, 103 Iowa, 592, 72 N. W. 787; *Wagner v. Railway*, 122 Iowa, 360, 98 N. W. 141.

In the second count plaintiff alleges negligence in respect of the operation of the passing train, it being said that it was run through the station and by the depot at such dangerous and negligent rate of speed as that the jar thereof put the baggage truck in motion and caused the collision between the same and the train, whereby the injury complained of resulted. In respect of the matter here alleged, it is sufficient to say that the record does not make it appear that the train was being run at an unlawful rate of speed. It does not appear that the engineer in control of the movement of said train had any reason to apprehend, even as a likelihood, that the team and drayman would be standing on the track, or that the baggage truck would be placed so close to the edge of the platform and the track as to invite a collision. It does appear that, when the engine approached sufficiently close to the depot as to make discovery of the situation possible, it was too late to check the speed of the train and avoid the collision that followed.

We think that no cause of action was made out, and accordingly the verdict for defendant was rightly directed.

Affirmed.

GRAHAM & WARD v. MACON, D. & S. R. Co.

(Supreme Court of Georgia, July 19, 1904.)

[49 S. E. Rep. 75.]

Connecting Carriers—Through Bills of Lading.*—Carriers may issue through bill of lading, and may make contracts for through shipments or for the interchange of freight between each other.

Railroads—Power to Operate Steamboats.—Railroad companies chartered under the general law may acquire and operate steamboats in connection with their lines of road.

Same—Same—Contract—Validity—Erection of Hoist.—There was, therefore, no public policy which prohibited a railroad company from entering into a contract with a firm by which the latter was to acquire and operate a steamboat and each party was to receive and deliver its freight to the other at the usual rates, in consideration of which the railroad company agreed to erect a hoist for the speedy and economical handling of freight between the boat and the cars.

Contract—Consideration.—Such a contract was not unilateral, was supported by a sufficient consideration, and the firm was entitled to maintain an action against the railroad company for damages for a breach of the contract.

Damages—Petition.—Irrespective of the question as to whether the special damages declared on were improperly set out, or that the data for calculating the other damages were wanting, it was nevertheless error to dismiss the petition on demurrer as the plaintiffs, in any event, were entitled to recover nominal damages for the breach of the contract.

(Syllabus by the Court.)

Error to City Court of Dublin; Adams, Judge.

Action by Graham & Ward against the Macon, Dublin & Savannah Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed.

A line of steamboats on the Oconee river was run in connection with a competitor of the Macon, Dublin & Savannah Railroad Company. In order to meet this competition, the railroad company, through its duly authorized agents, contracted with Graham & Ward that the firm should acquire a boat to be run on the river, agreeing to give them all the river freight controlled by the company, and to construct a hoist by which freight could be cheaply handled between the boat and the cars. It was further understood that Graham & Ward should deliver all the river freight controlled by them to the railroad company, and that both parties were to charge the usual rates. Relying on this contract, Graham & Ward leased a steamer for 12 months, and were ready,

*See *Farmer's Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.), 7 R. R. R. 852, 30 Am. & Eng. R. Cas., N. S., 852 (power of receivers to contract for transportation over connecting lines); note, 2 Am. & Eng. R. Cas., N. S., 649 (extent of carrier's right to contract for transportation over connecting lines); note, 20 Am. & Eng. R. Cas., N. S., 729 (authority of agents to make contract to carry freight over connecting lines); note, 11 Am. & Eng. R. Cas., N. S., 586 (whether carriers can be compelled to make contracts for transportation beyond their own lines); *State v. Wrightsville & T. R. Co.* (Ga.), 11 Am. & Eng. R. Cas., N. S., 576 (power of railroad commission to compel carrier to contract to carry beyond its terminus).

Graham & Ward v. Macon, etc., R. Co

able, and willing to comply with their part of the agreement. Their petition against the railroad company alleges that the company failed to comply with its contract, and for more than 12 months neglected to begin the construction of the hoist, which had not been erected at the time of the filing of the suit; that they delivered to the company all freights hauled or controlled by them, but that the company failed on its part to do likewise; that by reason of the failure to erect a hoist they lost the larger part of the river freight, and the business worked up by them, as without the hoist they could not receive or deliver freight as quickly or safely as required by shippers, who would otherwise have given the same to petitioners—whereby they were damaged generally and specially. By amendment they added a list of persons who could and would have delivered certain designated amounts of freight, but were deterred from doing so by want of the hoist; also a calculation as to the amount of damage sustained by reason of the loss of the profits thereon. The petition was demurred to on the grounds that it set out no cause of action; that the contract was uncertain, wanting in mutuality, and without consideration; that the damages were too remote; and that the contract was contrary to public policy, and void. The judge sustained the demurrer, and Graham & Ward excepted.

Davis & Sturgis, for plaintiffs in error.

Minter Wimberly and *Akerman & Akerman*, for defendant in error.

LAMAR, J. (after stating the facts). The contract for the exchange of freight was not void, as being contrary to public policy. Instead of defeating, it was intended to meet, competition. There is no suggestion of any restraint of trade, any increase of rates, any rebate or pooling, any unjust or unlawful discrimination, or anything that interferes with the right of a shipper to route his freight over a different or any desired line. Indeed, there is nothing to sustain this ground of attack, unless it be unlawful for parties who are able to contract to covenant to receive from and deliver to each all the freight controlled by the other. Graham & Ward, as individuals, had the natural and inherent power to make any contract not prohibited by law. The railroad company, on the other hand, had the power to make any contract not ultra vires, or not prohibited by law. Carriers can sell through tickets and issue through bills of lading. Each of these parties had the right from day to day to interchange freight with the other. If they could make such an exchange daily, there is no reason why they should not do so weekly, monthly, or by the year. If they could do so voluntarily, they, for a valuable consideration, could bind themselves to make the interchange. To such an agreement, the law would, of course, attach the incidents of prompt and adequate service, and the further qualification that the rights of the shipper or of the public should not in any way be prejudiced. But that the policy of the law is not against the traffic arrangement between these parties appears from the fact

Graham & Ward v. Macon, etc., R. Co

that the boat line and the railroad line were equivalent to an extension each of the other. The railroad company either had, or, as matter of course, could have obtained, the charter power to own and operate this boat on this river. Civ. Code, §§ 2174, 2183. Had it done so, of course no one would dispute that the interchange of freight between the boat and the cars would have been legal. And if this could have been done thus directly, there is no reason why it could not have accomplished the same interchange of freight indirectly, and without a purchase of the boat; for, in effect the contract was the acquisition of a qualified interest in a boat line. As long as the public is not harmed, there is no reason why the parties should not be held to the terms of the contract. Compare *Seaboard Air Line R. Co. v. W. & A. R. Co.*, 97 Ga. 289, 23 S. E. 848; *Coles v. Central R. Co.*, 86 Ga. 251, 12 S. E. 749; *Wiggins Ferry Co. v. Chicago & Alton R. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *Cumberland Valley R. Co. v. Gettysburg R. Co.*, 177 Pa. 528, 35 Atl. 952; *Tonawanda R. Co. v. N. Y. Cen. R. Co.*, 42 Hun, 496; *Wiggins Ferry Co. v. Ohio & Miss. R. Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Atchison, T. & S. F. R. Co. v. Denver R. Co.*, 110 U. S. 668, 4 Sup. Ct. 185, 28 L. Ed. 291, overruling *Denver & N. O. R. Co. v. Atchison, T. & S. F. Co.* (C. C.) 15 Fed. 650.

4. As to the other grounds of the demurrer: The covenant of each of the parties was a sufficient consideration to support the promise of the other. Civ. Code, § 3661. The lease of the boat, and the firm's readiness to receive and deliver freight, amounted to a performance, which justified the demand by them for a corresponding performance of the railroad's agreement to erect the hoist and receive and deliver freight as stipulated. Nor was the contract unilateral, or wanting in mutuality. The uncertainty as to its duration might have made it difficult to decree specific performance. But here the contention that it was for too indefinite or too long a period of time is answered by the fact that *Graham & Ward* only rented the boat for 12 months. And if, as contended, either party would have had the right to rescind, there is no allegation that any notice to that effect was given by the railroad company, which, instead of revoking, broke, the contract while it was in full force and being performed by *Graham & Ward*.

5. The case having evidently been dismissed on the ground that the contract was void, the question as to the elements and measure of damages was not passed upon. There was no statement as to the amount of freight diverted by the railroad company, and no data given from which the fact of damage therefor could be calculated. Any defect in this respect can be cured by amendment. But, whether there were any special damages or not, it was error to dismiss the petition on demurrer, since *Graham & Ward* were at least entitled to recover nominal damages for the railroad's breach of the contract. *Kenny v. Collier*, 79 Ga. 743 (1), 8 S. E. 58; Civ. Code, § 3801.

Judgment reversed. All the Justices concur.

PINE BLUFF & A. R. RY. CO. *v.* MCKENZIE.

(Supreme Court of Arkansas, April 15, 1905.)

[86 S. W. Rep. 834.]

Freight—Delivery to Carrier—Evidence—Bill of Lading.*—Defendant railway company, according to its custom, at plaintiff's request, left two cars on its side track, agreeing to remove them next day, if loaded. The cars were loaded and closed, and notice thereof given to a conductor of defendant's freight train on the evening of the day they were loaded, and he promised to move them the next morning, but before doing so the cars and contents were destroyed by fire. Held, a complete delivery of the freight contained in the cars to defendant, rendering it liable for the loss, though no bill of lading had been executed.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by B. F. McKenzie against the Pine Bluff & Arkansas River Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. H. West and *Briges & Wooldridge*, for appellant.

W. T. Young and *M. D. Danaher*, for appellee.

BATTLE, J. B. F. McKenzie sued the Pine Bluff & Arkansas River Railway Company for the value of one car load of cotton and of one car load of cotton seed and interest thereon. He alleged in his complaint that on the 29th day of October, 1901, he delivered to the defendant, at L. W. Clement's gin, for immediate transportation, one car load of cotton, of the value of \$1,227.60, to be shipped to Memphis, Tenn., and one car load of cotton seed, of the value of \$300, to be shipped to Little Rock, Ark.; that said defendant accepted the cotton and seed, and in consideration of a certain sum to be paid undertook to transport and deliver the same at the places mentioned, and wholly failed to do so, and that thereby the cotton and seed were entirely lost; and asked for judgment for the value thereof and interest thereon. The defendant answered, and denied these allegations.

The defendant constructed a switch or side track to its railway at a place called "Clement's Gin," upon which it received cotton and cotton seed for transportation. When any one wanted a car for the shipment of his cotton or seed from that place, he would request the defendant to furnish the same, at the same time making known its destination, and it would do so, leaving the cars on the side track to be loaded by the shipper, and when this was done would move the cars on the way to their destination by the first train passing after they were loaded. There was some controversy or conflict of testimony as to the custom of the defendant in respect to the time and manner it delivered bills of lading for

*As to what constitutes delivery of freight to the carrier, see footnotes appended to *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414.

Pine Bluff & A. R. Ry. Co. v. McKenzie

the freight. But, be this as it may, the undisputed evidence shows that it frequently delivered them after the goods had been shipped, and that they were not conditions precedent of the shipment.

Plaintiff requested the defendant to furnish him with two cars at Clement's gin, one for cotton to be shipped to Memphis, Tenn., and the other for cotton seed to be shipped to Little Rock, Ark. On the 29th of October, 1901, the two cars were left by the defendant on the side track at the place designated, and on that day they were loaded by the plaintiff, one with cotton and the other with seed; and plaintiff notified the conductor of defendant of that fact, and he promised to take them out on the next morning. About 3 o'clock on the next morning the cars and contents were destroyed by fire. The cotton and seed were of the value alleged in the complaint.

The court instructed the jury, at the request of the plaintiff, as follows:

"The liability of a common carrier attaches at the time the goods to be shipped are received by it for transportation, and not from the time of the issuance of a bill of lading only. When the shipper surrenders the entire custody of his goods to the carrier for immediate transportation, and the carrier so accepts them, that instant the liability of a common carrier begins. When this occurs, the delivery is complete, and it matters not how long, or for what cause, the carrier may delay putting the goods in transit. If a loss is sustained, not occasioned by the act of God or the public enemy, the carrier is responsible.

"Therefore if the jury believe from the evidence that the plaintiff ordered two cars from the defendant to be placed for loading at Clement's gin, one to be loaded with cotton for Memphis and the other with cotton seed for Little Rock; that the defendant placed the cars as ordered, and the plaintiff loaded them with the cotton and cotton seed as aforesaid, closed the cars, and notified the conductor in charge of the defendant's train that the said cotton and cotton seed were loaded and ready for shipment, and requested him to take them out, having previously given him the destination of said cotton and cotton seed, and that the conductor agreed to do so; and if you further believe from the evidence that under the usual and customary course of dealings between the plaintiff and defendant this was all that was required of the plaintiff by the defendant before putting the goods in transits—then you are instructed that this was a complete delivery of the cotton and cotton seed to the defendant for shipment, and the defendant is liable to the plaintiff for the loss of the said cotton and cotton seed."

And at the request of the defendant as follows:

"(4) If the jury believe from the evidence that according to the custom governing shipments of cotton and seed which existed on the line of the defendant at the time and place of the destruction by fire of the plaintiff's cotton and seed it was neces-

Abbott v. Oregon R. Co

sary for the shipper of cotton and seed, in order to effect a shipment or delivery of his cotton or seed to the defendant, to offer a bill of lading for signature, or give such shipping directions to the agent or conductor to whom such shipment was offered as to enable him to make out a bill of lading, and, without doing such things, the plaintiff or his agent simply told the conductor of defendant at English on the night of October 29th that plaintiff had loaded the cars with cotton and seed, and desired them moved, then plaintiff cannot recover, and you should find for the defendant."

The jury returned a verdict in favor of the plaintiff for \$1,573.43. Judgment was rendered in his favor for that amount, and the defendant appealed.

Appellant contends that the evidence fails to show a complete delivery of the cotton and seed, that no bill of lading was executed, and fails to show that it was the custom of appellant to accept the delivery of freight until it was executed. This was not necessary. The bill of lading properly follows the delivery, and is an acknowledgment of that fact. While it may be used as evidence of that fact, it is not the only evidence. Here appellant, in pursuance of its custom, at the request of the appellee, had left cars on its side track, with the agreement, implied, if not expressed, that it would remove the cars the next day, if they were loaded, and carry them on to their destination. Notice of that fact was given to appellant. The cars were loaded and closed. The control and possession of their contents were completely surrendered to the railway company. Nothing remained to be done by the appellee. The cotton and seed awaited the coming of the appellant's train. The cars were in its possession and were the receptacles in which it accepted the delivery of the cotton and seed. They were left there for that purpose and with that understanding. The delivery was complete, and appellant is responsible for their loss. *Railway Company v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

Judgment affirmed.

ABBOTT v. OREGON R. Co. et al.

(Supreme Court of Oregon, May 22, 1905.)

[80 Pac. Rep. 1012.]

Carriage of Passengers—Degree of Care—Stations—Duty to Light.*

—A carrier of passengers by rail is bound to exercise reasonable care to keep its platforms, approaches, and station grounds, so far as passengers would naturally resort to them, properly lighted at

*As to the degree of care required of a carrier of passengers, see foot-notes appended to *Topp v. United Rys. & Electric Co. (Md.)*, 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; *Lincoln Traction Co. v. Webb (Neb.)*, 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; *O'Brien v. St. Louis Transit Co. (Mo.)*, 14 R. R. R. 413, 37 Am. &

Abbott v. Oregon R. Co

night for a reasonable time, as determined by the circumstances of the case, the size and importance of the station, and the business done there, next prior to the arrival and immediately following the departure of a passenger train scheduled to stop at the station during the night.

Who Are Passengers.—A passenger who has completed his journey and alighted from the train at the station is allowed a reasonable time to leave the premises, and an intending passenger may occupy the depot waiting room a reasonable time immediately preceding the arrival of his train, during which he occupies a relation towards the carrier analogous to that of a passenger.

Stations—Duty to Light—Notice—Knowledge of Train Dispatcher.—The knowledge of a train dispatcher that passengers arriving on a special train over another road at night intended to take a train on his road did not bind his road to light its depot platform until a reasonable time prior to the arrival of its train.

Same—Same.—Whether a period of time prior to the arrival of a night passenger train was a reasonable one during which the railroad should have kept its platform lighted for the accommodation of passengers held a question for the jury.

Right of Passenger to Alight at Intermediate Point—Stations—Duties of Carrier.—A passenger may leave the car or boat on which he is traveling to transact his private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers, and if he is injured without his fault, in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or so used with its consent, he may recover the damages sustained.

Same—Contributory Negligence—Unlighted Platform.—A passenger, waiting at a station on a dark night for its train, who is permitted to remain in a well-lighted car provided with necessary conveniences, is guilty of contributory negligence where he leaves the car to walk, for the mere purpose of exercise, on the unlighted station platform.

Appeal from Circuit Court, Sherman County; W. L. Bradshaw, Judge.

Action by George Abbott against the Oregon Railroad & Navigation Company and another. From a judgment for plaintiff, defendants severally appeal. Reversed.

This is an action by George Abbott against the Oregon Railroad & Navigation Company and the Columbia Southern Railway Company, to recover damages for a personal injury alleged to have been sustained by plaintiff while a passenger of the defendant companies, and caused by their negligence in failing to maintain a railing at, and in omitting to keep a lamp burning on, a depot platform jointly used by them. The defendants, separately answering, denied the material allegations of the complaint, and for further defenses averred that plaintiff, at the time

Eng. R. Cas., N. S., 413; foot-notes appended to *Hart v. Seattle*, etc., Ry. Co. (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430.

As to a carrier of passengers' duties with respect to stations, platforms, and other stopping places, see *Hart v. Seattle*, R. & S. Ry. Co. (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; foot-notes appended to *Topp v. United Rys. & Elec. Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 13 R. R. R. 295, 36 Am. & Eng. R. Cas., N. S., 295.

Abbott v. Oregon R. Co

he was injured, was not a passenger of either company, and that his hurt was caused by his own want of care. The allegations of new matter in the answer having been denied in the replies, the cause was tried, and judgment rendered against the defendants, or either of them, for the sum of \$20,000, and they severally appeal.

W. W. Cotton, for appellant O. R. & N. Co.

Zera Snow, for appellant C. S. R. Co.

A. S. Bennett, for respondent.

MOORE, J. (after stating the facts). It is contended by defendants' counsel that the testimony introduced by plaintiff conclusively shows that the injury of which he complains was caused by his contributory negligence, and hence the court erred in overruling their motions for judgments of nonsuit, based on that ground. The legal principle insisted upon necessitates an examination of the bill of exceptions, which shows that the Oregon Railroad & Navigation Company is a corporation owning and operating a railroad from Portland east to Huntington, passing through the station of Biggs, situated on the south bank of the Columbia river. The Columbia Southern Railway Company is also a corporation owning and operating a railroad from Biggs south to Shaniko. The depot and tracks at Biggs are owned by the former company, but the cost of maintaining the station is borne, and the tracks and premises connected therewith are jointly used, by both, in receiving and discharging passengers. The station building is placed east and west between parallel tracks, the Oregon Railroad & Navigation Company using the lines of rails on the north side of the depot, and the other company those on the south. This building is surrounded by a plank platform 16 feet wide on the north, 12 on the south, and 14 on the east and west. The land on which the depot stands slopes to the south, so that the north edge of the platform is level with the tracks of the Oregon Railroad & Navigation Company, while the south edge is about five feet above the rails on that side, and the center of the west edge about six feet above the surface of the ground, which at that point is somewhat depressed. The Columbia Southern Railway Company, at the time of plaintiff's injury, was operating daily trains only, but the other company was running night passenger trains—No. 6, going east, passing through Biggs at 12:22 midnight, and No. 3, going west, at 3:30 A. M. These trains were not scheduled to stop at that station, which was closed at night, and no light maintained at the depot, the passengers being accommodated by the day trains of both companies which stopped at that junction.

The plaintiff is 59 years old, has traveled extensively by rail, is engaged in buying wool on commission, and had been at Biggs 11 times prior to his injury, passing in the daylight over a gang plank extending from the depot platform to the cars of the Columbia Southern Railway Company. With other buyers, he was

Abbott v. Oregon R. Co

at Shaniko June 27, 1903, attending a sale of wool, which was not concluded until evening. As these dealers could save a day's time if they could reach Biggs and take the night passenger trains of the Oregon Railroad & Navigation Company, they employed the other company to carry them by special train to that junction, the train dispatcher of the former company having telegraphed that its night passenger trains would stop at Biggs if the special train reached there in time. The train so chartered left Shaniko at 8:40 p. m., and reached the junction at 12:15 that night, the car in which the wool dealers rode being left on the south side of the depot, and near the west end thereof. A few minutes thereafter train No. 6 stopped at the north side of the depot, and the passengers from Shaniko, who were going east, were escorted by a trainman of the Columbia Southern Railway Company, having a lantern, from its car, over the gang plank and across the west end of the depot platform to the train of the other company. The plaintiff accompanied the departing passengers to their train, and immediately returned with the trainman to the car which he had left, intending to take passage for Portland when train No. 3 arrived. The car in which plaintiff was to wait was well lighted, and provided with a suitable toilet room. He sat down, and tried to slumber, but on the way from Shaniko the passengers had freely indulged in smoking, and he was unable to sleep. Being weary from the effects of his ride and fatigued from the strained position occasioned by sitting for several hours in an ordinary passenger car, he arose, left the coach, and again passed over the gang plank, intending to cross the tracks of the Oregon Railroad & Navigation Company to seek refreshment in a cool breeze from the Columbia river, and also to urinate. Instead of going directly north, he turned to the west, and slowly walked in the darkness to the edge of the depot platform, which was not protected by a railing, and fell to the ground, sustaining such an injury that one of his legs had to be amputated below the knee. As a witness in his own behalf he testified on cross-examination that he had been at Biggs several times prior to June 28, 1903; that he knew the station platform was level with the car tracks on the north, but elevated on the south, requiring a gang plank, over which he had always passed in entering or leaving the coaches of the Columbia Southern Railway Company, but he had never particularly noticed the ground around the station; that he knew the platform did not extend indefinitely to the west; and, referring to the time when he was injured, he said, "It was the darkest night I ever saw."

In support of the judgment rendered it is asserted by his counsel that, as the defendants jointly maintain the depot at Biggs, each owes a duty to persons arriving on the cars of one company to take passage on those of the other to provide a reasonably safe platform, and to see that it is suitably lighted at night for a reasonable time before the arrival and after the departure of their trains, and for any neglect in these particulars they are jointly

Abbott v. Oregon R. Co

and severally liable for any damage resulting therefrom; that the Oregon Railroad & Navigation Company, having agreed to stop its train No. 3 at Biggs, on the night in question, for the accommodation of persons coming on the special train from Shaniko and intending to go west over its line, thereby established the relation of carrier and passenger with such persons from the time of their arrival at the junction, and, neither company having lighted the depot or platform; plaintiff, who then was a passenger of both companies, and entitled to go on the platform for exercise and to secure pure air, had the right to assume from its dark condition that it was reasonably safe for his accommodation, but, having been dangerous by reason of the defendants' failure to maintain a railing or a light, he is entitled to recover from them the damages awarded by the jury, and hence no error was committed as alleged.

It will be remembered that the night passenger trains of the Oregon Railroad & Navigation Company were not scheduled to stop at Biggs, and for that reason no light was maintained there. The plaintiff's right to recover compensation for the injury sustained depends upon the existence of some duty owed him by the defendants, or either of them, the breach of which was the proximate cause of his hurt. *Emry v. Roanoke Navigation Company* (N. C.) 16 S. E. 18, 17 L. R. A. 699. The law imposes on a railway company engaged in carrying persons for hire the duty of exercising reasonable care in keeping its platforms, approaches thereto, and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a reasonable time next prior to the arrival or immediately following the departure of a train which its time cards specify will stop at night to take on or put off passengers. 3 *Thomp. Neg.* sec. 2691; 4 *Elliott, Railways*, § 1641; *Hutch. Car.* (2d Ed.) § 516; *Louisville, etc., Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Ohio, etc., Ry. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218. What constitutes a reasonable time during which such premises must be kept lighted is determined by the circumstances of each particular case, and depends upon the size and importance of the station and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company. 3 *Thomp. Neg.* sec. 2686; *Alabama Great Southern Ry. Co. v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354; *Louisville, etc., Ry. Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794. A person who has completed his journey on a railroad train and alighted therefrom at a station provided for the accommodation of the general public is allowed a reasonable time to leave the premises; and one who lawfully intends to secure passage on the cars is permitted to occupy the waiting room of a depot a reasonable time immediately preceding the arrival of a train which he expects to take, during which such person sustains towards the carrier a relation analogous to that of a passenger, to whom the railway company owes a duty com-

Abbott v. Oregon R. Co

mensurate with the degree of danger to which such person may be exposed. 4 Elliott, Railways, sec. 1592, 2 Wood, Railways (Minor's Ed.) sec. 310. In *Heinlein v. Boston & Providence Ry. Co.* (Mass.) 16 N. E. 698, 9 Am. St. Rep. 676, it was held that a person remaining at a station three or four minutes after he knows that the train which he desired to take had already gone, when there was nothing to detain him except his wish to take a street car which would soon arrive at such station, ceases to have the rights of an intending passenger, and cannot recover for injuries sustained by him in attempting to leave the station by reason of the station door being closed, the station lights extinguished; and the passage by which he endeavored to depart insufficiently illuminated. In *Quantz v. Southern Railway Co.* (N. C.) 49 S. E. 79, a person having arrived at night on a train at his destination left the station grounds, but, returning in a few minutes to the depot on business of his own, walked into an open doorway, and, falling, was injured, and it was ruled that he had ceased to be a passenger, and was only a licensee, to whom the railroad company did not owe the duty of keeping the door closed, but only of maintaining a way that was free from danger. In *Missouri, etc., Ry. Co. v. Neiswanger*, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304, the appellee, a stranger, arrived by rail at Beloit, Kan., about 5 o'clock p. m., and went immediately into the depot, intending to go to Osburn, in that state, by the next train, which she was informed by the agents of the company would leave at 9:20 that night. Having secured a ticket entitling her to be carried on the appellant's cars to her destination, she left the depot, but returned "about dusk" on May 6th, and waited to resume her journey. Her train not having arrived at 11 o'clock p. m., she had occasion to go to the toilet, but, there being none in the building, she went upon the depot platform, which was not lighted, and walking off, sustained an injury, and it was held that the railroad company was liable therefor. In *St. Louis, etc., Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741, the appellee, having secured a coupon ticket for the entire distance, left Gainesville, Tex., with her babe, for Mt. Vernon, in that state, going via Greenville, where she was to change cars. At the latter city she was transferred to the appellant's depot, which she reached at 2 o'clock p. m., and, being a stranger without money, and informed that no hotel or boarding house was within a mile of the station, she concluded to remain in the waiting room until 12 o'clock that night, when the next passenger train for Mt. Vernon would arrive. The station agent, knowing her intention, either consented, or at least made no objection, to her occupying the room until she could resume her journey. About 9:30 o'clock p. m. the appellant's night agent in charge of the depot entered the waiting room, turned down the light, placed his arm around the appellee, and, over her protest, tried to kiss her, and also made improper proposals to her. She pleaded with him to desist, and not molest her, whereupon he returned to his office,

Abbott *v.* Oregon R. Co

and she quietly left the depot with her babe, and went to a private residence, and notified the occupant of the attempted outrage. Mrs. Griffith commenced an action against the railroad company to recover damages for the assault, and, having secured a judgment, it was affirmed on appeal; the court holding that as she possessed a ticket, and had gone to the depot for the purpose of taking passage on the first train that arrived, and, by the assent of the station agent, was permitted to occupy the waiting room, she sustained the relation of a passenger, to whom the company owed a duty to protect, and it was therefore liable in damages for the assault of its agent. In *Missouri, etc., Ry. Co. v. Neiswanger*, *supra*, the question of reasonable time before the arrival of a train when a person at a depot intending to take a train may be regarded in the nature of a passenger was not involved, for, the train having been scheduled to reach the station at 9:30 P. M., and thereafter momentarily expected to arrive, when Mrs. Neiswanger was injured, shows that she was certainly entitled to protection. So, too, in *St. Louis, etc., Ry. Co. v. Griffith*, *supra*, the question of reasonable time was not in issue, for Mrs. Griffith's occupancy of the waiting room at the depot was not in pursuance of an absolute right, but resulted from the station agent's knowledge that she intended to remain at the depot 10 hours, waiting the arrival of her train, and his assent thereto.

In the case at bar the testimony shows that the agents of the Columbia Southern Railway Company who operated the special train were informed that plaintiff intended to take passage for Portland on train No. 3 of the other company when it reached Biggs, and, knowing this, they assented to his occupying the car in which he had made the journey from Shaniko until the arrival of the other train. The Columbia Southern Railway Company, by reason of this assent of its agents, thereby treated plaintiff in the nature of a passenger, notwithstanding it had safely carried him the entire distance agreed upon. The train dispatcher of the Oregon Railroad & Navigation Company had agreed to stop train No. 3 at Biggs if the special train reached that station in time, and he must have known that some passenger would be at the depot intending to go west. This knowledge, however, in the absence of any stipulation to that effect, did not bind the last named company to light its depot platform until a reasonable time next prior to the arrival of its west bound passenger train. The plaintiff, having accompanied the wool buyers going east to their train, returned to the car provided for his accommodation about three hours before train No. 3 was expected to arrive. Whether or not such period of time next prior to the arrival of a train is reasonable during which the Oregon Railroad & Navigation Company should have kept its depot platform lighted at a station where its night passenger trains were not scheduled to stop, is not now necessary to inquire, for that was a question exclusively for the jury to determine.

Abbott v. Oregon R. Co

In considering the action of the trial court in overruling the motions for judgments of nonsuit interposed on the ground of plaintiff's alleged contributory negligence, we shall for the present treat the question as it relates to the duty of the Columbia Southern Railway Company only, basing our conclusion on its assent to plaintiff's occupying its car until the arrival of the west bound passenger train on the road of the other company. This car was pro hac vice a depot to all intents and purposes, well lighted, and provided with a suitable toilet room, so that it was unnecessary for plaintiff to leave it, as in the cases of *Missouri, etc., Ry. Co. v. Neiswanger*, supra, and *Louisville, etc., Ry. Co. v. Treadway*, supra, to obey an urgent call of nature. The testimony shows that the coach provided for plaintiff's accommodation was scented with tobacco smoke, but it nowhere appears in the bill of exceptions that the fumes of that weed were offensive to him, as in the case of *McDonald v. Chicago, etc., Ry. Co.*, 95 Am. Dec. 114, in which Mr. Chief Justice Dillon said: "If the station room is full, or if it is intolerably offensive by reason of tobacco smoke so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode, and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care, and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed." At the time plaintiff sustained the injury he did not go upon the station platform for the purpose of entering a car in which he expected to take passage, or to transact any business with either railroad company, nor was he for any reason necessarily compelled to leave the coach which he occupied. His act in leaving the car at the time and under the circumstances indicated, and going to the platform, which he knew was not lighted, is sought to be justified on the ground that he was entitled to walk for exercise, and to secure fresh air, and that he had a right to assume, from the extreme darkness, and his knowledge that the defendant companies were aware that he was waiting the arrival of a train at a depot jointly used by them, that they had discharged the obligation devolving upon them of making the station platform reasonably safe, and that, relying thereon, he was injured in consequence of their breach of duty, thereby rendering them liable for the damages resulting from the injury which he sustained. He could undoubtedly have secured an abundant supply of fresh air by raising a window of the coach, thereby ventilating it, and hence he was not obliged to leave the car for that purpose.

This brings us to a consideration of the remaining question—whether or not a person sustaining the quasi relation of a passenger can, for the mere purpose of exercise, leave a well-lighted

Abbott *v.* Oregon R. Co

depot, provided with necessary accommodations, and go in the darkness upon a walk surrounding the station, and recover damages for an injury sustained in consequence of the carrier's failure to maintain a railing on or its omission to light the platform. A passenger, before reaching his destination, may leave a car or a boat to transact his own private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers; and if, without his fault, he is injured in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or used with its consent, he may recover the damages sustained. 1 Fetter, Carriers, sec. 234. Thus, in *Dice v. Willamette Transportation Co.*, 8 Or. 60, 34 Am. Rep. 575, the plaintiff, a passenger, before reaching his destination, attempted to leave the defendant's steamboat to transact his own business at a landing where passengers and freight were being discharged, and, the night being dark and rainy, and the lights on the boat and on the wharf insufficient to enable him plainly to see his way, he fell, sustaining an injury, and it was held that he had a right of action against the carrier for its negligence in not providing a safe means of egress from the boat to the wharf.

In *Hrebrik v. Carr* (D. C.), 29 Fed. 298, notice having been given that a steamer would sail early on a certain morning, the plaintiff and her husband went on board the boat the evening before her departure, and soon thereafter he, in attempting to cross to the wharf to secure some tobacco, fell from the gang plank, and was drowned. In an action to recover for the death it was held that a passenger on board a vessel before she left port had the right to go ashore for the purpose stated, and that it was the duty of the carrier to provide a safe means of passage from the steamer to the pier. In that case it does not appear that the night had set in, or, if so, that the passageway was not lighted. In deciding the case Benedict, J., says: "The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier, is a common incident to travel. It is constantly done to find lost baggage, to speak to a friend, and may be done to purchase tobacco by any one addicted to the use of that weed. From this necessity arises the obligation on the part of the ship to keep and maintain for the passenger's use, at all proper times, a safe passageway from the steamer to the pier."

In *Alabama, etc., Ry. Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1, the appellee, a lineman in the employ of the Western Union Telegraph Company, was traveling in the caboose of a freight train to a point where repairs were to be made. The train on which he was riding stopped at Rising Fawn, Ga., an intermediate station, at the usual place for the alighting of passengers from freight trains, which was about 1,500 feet from the station proper. The appellee got off the car and started to walk to the station by the only practicable way, which was between the main

Abbott v. Oregon R. Co

track and the house track, to see if there was any telegram for him from his employer. As he was going to the station he saw a part of the train on which he came backing towards him on the main line, and as it approached he concluded it would be safer to cross over near the house track, and in doing so he was struck and injured by a switching car on a cut-off. In an action to recover damages for the hurt inflicted the railroad company introduced testimony tending to show that the appellee was loitering along between the tracks, talking with acquaintances whom he met; that he had no reason to anticipate the receipt of a telegraphic order at that point; and that he was standing on or near the track, looking up at the telegraph wires, when struck. The trial court, having instructed the jury in relation to the degree of care due from a railroad company to a passenger on a freight train, said: "Now, when they reached Rising Fawn, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger, and would be entitled to the degree of care belonging to a passenger. Now, that the rule applies until he had time to get off the car, going along exercising reasonable prudence to do so, attend to his business (if any he had), and return, and no longer. The liability of the company to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return after transacting his business, and did not extend to him after the lapse of that time. After that they owed him no duty, except that which they owed to any stranger—not to wantonly or unnecessarily injure him. * * * Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot, that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot, and if, instead of that, he, out of mere curiosity, got out to look through the yard and talk with the employees in the yard—if he stopped in the yard, and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a silent proof that tends to show that)—why, then, in each of these contingencies, he would cease to be a passenger, but would be there on the switchyard at his peril; and the only duty the defendant company would owe to him in such a situation as that would be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe a stranger in the yard without any business." A judgment having been rendered against the railroad company, was affirmed on appeal; Taft, J., in referring to the instructions,

Abbott v. Oregon R. Co

saying: "The foregoing states the law correctly, and leaves to the jury the issue in such a way as to enable them, without difficulty, justly to determine whether Coggins was entitled to the high degree of care from the railroad company due a passenger when he was struck." Further in the opinion it is said: "The authorities are not quite so uniform upon the question whether the obligation of the carrier extends to the same degree of care over the safety of its passengers when they alight at intermediate stations and go to the station house while the train is waiting. But we think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." In that case nothing is said as to what time the appellee was injured, but, as it is intimated that he was looking up at the telegraph wires when he was struck, it is to be inferred that it was daylight. This being so, what is said in the opinion about the right of a passenger to walk up and down the depot platform for exercise can have no application to explorations made at such a place in utter darkness.

In *St. Louis & San Francisco Ry. Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, W. F. Coulson was a passenger on appellant's train, which stopped at an intermediate station for dinner. He left the car in which he was riding, and went to an eating house, where he secured his lunch, and, having returned, he passed through a car to the depot platform, where, having been informed by the conductor that the train would start in three or four minutes, he walked to the platform on the opposite side, and stood five or six feet from the end of a coach. He then started towards the car, whereupon he caught his foot in a warped plank, and, falling, put out his hand for protection, and as he did so the train simultaneously started, whereby he was injured. A judgment having been rendered against the railroad company for the damages sustained, it was contended by the appellant that its obligation under the contract ceased when Coulson got his lunch and returned to the car. The court, discussing this question, say: "We cannot consent to this doctrine. The train had stopped for dinner. The passengers were invited to this platform. It was maintained for their safety and convenience, and they were expected to get on and off. This was involved in and connected with the regular passenger service of the road. The act of Coulson in leaving the train at this particular point, after he had returned from his luncheon, is not sufficient to justify this court in declaring as a matter of law that he was negligent, or that the obligation of the company to provide safe passage for him had been fulfilled, or that the relationship as a passenger to the com-

Abbott v. Oregon R. Co

pany had for the time ceased." In that case the injury occurred at the noon hour, when the passenger was undoubtedly afforded sufficient natural light plainly to see the passageway that had been provided by the railway company for the accommodation of the traveling public.

In *Chicago, etc., Ry. Co. v. Woolridge*, 32 Ill. App. 237, the appellee, having a railroad ticket, was walking on a depot platform about 9 o'clock p. m., waiting the departure of his train, which stood on a side track, and was expected to pull out after a "rally" meeting adjourned. Another train coming in rapidly hit a baggage truck which was being pulled on the platform, causing it to strike and injure him. In an action to recover the damages resulting from the hurt the court refused to instruct the jury that unless the appellee was at the place where he was injured on business with the railroad company, or was there to take a train about to depart from the station, or to meet some one expected to arrive on the train which struck the baggage truck, or to see some one about to leave, then, if there was a suitable waiting room, though he was expecting to depart on some other train for which he might have been waiting, he had no right to be on the depot platform at the time he was injured. A judgment having been rendered against the company, was affirmed on appeal; the court, in referring to the charge requested, saying: "We do not think this states the law correctly. To hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting room, and that if he goes out upon the platform at any time before it becomes necessary to board his train he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense." In that case the baggage master testified that he lighted the gas at the baggage room door before the arrival of the train causing the injury. The depot platform must also have been lighted, for Woolridge testified that he saw the baggage truck when it was struck by the incoming train.

In *Lemery v. Great Northern Ry. Co.*, 83 Minn. 47, 85 N. W. 908, the plaintiff having purchased a railroad ticket, entered a day coach at Duluth, Minn., for a continuous passage to Park River, N. D., on defendant's through train that did not stop at intermediate stations to receive or discharge passengers. After the train started, plaintiff left the car originally taken, passed to the rear into a sleeping car, going through a coach occupied by a military company that maintained guards at each entrance of the car, but passengers were not prevented from passing through it when necessary. As the conductor entered the sleeper, plaintiff discovered that he had lost his ticket, and, being compelled to pay his fare, he demanded a receipt therefor, but none was given him, the conductor claiming that his blank acknowledgments of payment were at the other end of the train. The plaintiff remained in the sleeper until the train arrived at Grand Rapids, Minn., where it was stopped at night, when it was very

Abbott v. Oregon R. Co

dark, for the purpose only of taking water. When the train came to a halt, plaintiff left the sleeper, as he insisted, to find the conductor and again to demand a receipt, and also to pass around the car occupied by the militia and enter the day coach, claiming that he was not permitted longer to remain in the sleeper, and that the military guards would not allow him to pass through the car which was under their care and protection. In alighting at the station plaintiff fell between the steps of the sleeper and the depot platform, which was not lighted, sustaining an injury. An action having been begun to recover the damages resulting from the hurt sustained, a judgment of nonsuit was rendered, which was affirmed on appeal, the court finding that the reasons assigned by plaintiff for going to the station platform were subterfuges, and holding that a through passenger on a train which did not stop at intermediate stations, who leaves such train without the knowledge, consent, or invitation of the company at any intermediate station at which the train may stop for some purpose necessary to its operation and management only, abandons for the time being his relation as a passenger, and assumes all the risks incident to his movements. In rendering that decision, Mr. Justice Brown, speaking for the court, says: "In the case of a local train the company is bound to know that passengers may be received and discharged at all stations at which a train may stop for that purpose, and is required by the rule to keep the approaches to the train in a safe condition for their egress and ingress." Further in the opinion it is said: "This was not a local train, but a through train, and the plaintiff was a through passenger. The train did not stop at Grand Rapids to receive or discharge passengers. There was no invitation held out to plaintiff to leave the train at that station. There was no occasion for him to do so, and he must be taken to have assumed all risks incident thereto. There was not only no invitation, express or implied, to passengers to leave the train at this station, but the fact that the station platform was unlighted was in the nature of a warning to them to remain on board."

The cases to which attention has been called, illustrating the right of a passenger, without forfeiting his relation as such, to leave a car or a boat at an intermediate station or landing to transact business of his own, or for his own pleasure, where a stop is made to receive or discharge passengers, are relied upon by plaintiff's counsel to justify their client in assuming from the unlighted platform that it was safe for him to walk thereon. An examination of these cases will show that *Dice v. Willamette Transportation Co.*, supra, is the only one cited in which judgment is given for injuries received in the darkness by a passenger at an intermediate station or landing by leaving a car or a boat to transact business not connected with the carrier, and in that case it will be remembered that the steamboat and the wharf were lighted, but not sufficiently to enable the plaintiff to discover and avoid the danger to which he was exposed. In that

Abbott v. Oregon R. Co

case, the boat having made a landing at night where passengers and freight were being discharged, Dice might reasonably have inferred from the light on the wharf and on the steamer, which he must have seen, that the passageway was sufficiently illuminated to enable him safely to go ashore. In the case at bar, if the plaintiff had necessarily been compelled to leave the car because the Columbia Southern Railway Company neglected to furnish suitable accommodations, or if the train of the other company, upon which he expected to take passage, was approaching Biggs Station, so that to board it he was obliged to cross the depot platform in the darkness, a very different rule of law would be applicable. The right of a passenger, before reaching his destination, to leave a car and to walk on a depot platform for exercise, when the train is stopped in daylight, to receive or discharge passengers, or at night, even, when the walk is sufficiently illuminated, is admitted. The vibration of a car in rapid motion prevents a passenger from materially changing his position in a seat, the occupation of which for several hours necessarily produces extreme tension of the muscles of the lower limbs, to relax which relief is found in walking, and, as this cannot readily be secured in a car, it must be obtained, if at all, outside the coach, and when it is at rest. When a train is stopped in daylight for any reasonable length of time to receive or discharge passengers, an invitation is thereby tacitly extended by the railroad company to the passengers in the coaches to alight for a few minutes' rest and invigoration by a change of position and a respiration of pure air. This same invitation, it would seem, must also be offered at night where a train is stopped for a reasonable time to receive or discharge passengers at a station, the platform of which is well lighted. A passenger on a train, before reaching his destination, cannot, in reason, be invited to leave the car every time a stop is made at night to receive or discharge passengers. If a contrary rule were to obtain, it would necessarily follow that a railroad company would not venture to stop a train when flagged at night at an insignificant station, the platform of which was not illuminated, however urgent might be the call to board the train. When the platform of a depot at which a train stops at night is not illuminated, the darkness is a notice to passengers in the cars who are not obliged to depart at that station to remain in the coaches. *Lemery v. Great Northern Ry. Co.*, supra. So, too, where a person, intending to take a train, goes at night to a well-lighted waiting room of a depot, and, leaving it, walks to an unlighted freight platform, and there sustains an injury, his contributory negligence precludes a recovery. *Gunderman v. Missouri, etc., Ry. Co.*, 58 Mo. App. 370. In that case the plaintiff, knowing the construction of the depot, went to a platform not intended to be used by passengers. It is cited, however, to show that an unlighted way imparts notice to all persons except such as are necessarily compelled to pass over it. In deciding that case the court, referring to the

St. Louis, etc., Ry. Co. *v.* Moss

plaintiff, say: "He wantonly left the comfortable waiting room and well-lighted passenger platform of defendant, and sauntered forth into the darkness, and upon the defendant's freight platform, and without there giving heed to the existing conditions, patent to his senses, and which were sufficient to have warned an ordinarily prudent man of the probable danger of proceeding further, he persisted in going forward until he fell into the pit. He was guilty of such contributory negligence as must preclude his recovery." To the same effect, see *Grimes v. Pennsylvania Company* (C. C.) 36 Fed. 72.

In the case at bar plaintiff had crossed the depot platform several times in daylight before he was injured, and, though he testified that his attention was never called to the condition of the ground at the west end of the platform, he knew the south side of the walk surrounding the building was elevated while the north side was level with the track of the Oregon Railroad & Navigation Company. Knowing these facts, reason must have taught him that the surface of the ground at the west end of the platform descended to the south, unless it had been graded up to that line.

If it was incumbent upon either of the defendants to light the depot platform three hours before a train was expected to arrive, the failure in this respect was known to the plaintiff, who, when he was injured, was not necessarily compelled to leave the well-lighted car that had been provided for his accommodation; but, having done so, on one of the darkest nights he ever saw, his injury results from his own contributory negligence, thereby precluding a recovery of damages for the hurt sustained. *Massey v. Seller*, 77 Pac. (Or.) 397; *Missouri, etc., Ry. Co. v. Turley*, 85 Fed. 369, 29 C. C. A. 196; *Emery v. Chicago, etc., Ry. Co.*, 77 Minn. 465, 80 N. W. 627.

There being no conflict in the testimony, an error was committed in refusing to give a judgment of nonsuit in favor of each defendant. The judgment is therefore reversed, and the cause remanded, with directions to sustain the motions interposed.

 ST. LOUIS, I. M. & S. RY. CO. *v.* MOSS.

(Supreme Court of Arkansas, April 8, 1905.)

[86 S. W. Rep. 828.]

Carriage of Freight—Failure to Supply Cars—Demand by Shipper—Sufficiency of Complaint.—A complaint in an action against a railroad for failure to furnish a car for a shipment alleged that plaintiff placed certain goods on defendant's side track for shipment, making a verbal demand on the agent of defendant at the nearest station, and on those operating a local freight train on the division in question, for a suitable car for the shipment, and that plaintiff also wrote the train master two or three letters. Held, that the complaint was demurrable, in that it failed to show a demand on a person authorized to furnish cars.

St. Louis, etc., Ry. Co. v. Moss

Same—Delay in Shipping—Sufficiency of Complaint.*—The complaint, further alleging that defendant neglected and refused to furnish plaintiff a car for the shipment of his goods, and that plaintiff loaded his goods in a car that had been ordered by some one else, and thereafter the car was negligently permitted to stand on the side track for five days, was sufficient, against a demurrer, to show a cause of action for negligent delay in shipping the goods.

Pleading and Practice.—Though the material allegations of a pleading are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment that facts exist sufficient to constitute a cause of action or defense, the defect must be corrected by a motion to make more definite and certain, and not by a demurrer.

Appeal from Circuit Court, Clay County; Allen Hughes, Judge.

Action by one Moss against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This suit was before a justice of the peace in Clay county upon the following complaint: "The plaintiff, for his cause of action against the defendant, states that the defendant is a corporation organized and existing to the law of the state of Missouri, and owning and operating a railroad through the county of Clay, in the state of Arkansas; that on the 15th day of July, 1901, this plaintiff placed upon the side track of the said defendant at Aver Switch, a side track of the said railroad company in the said county and state, a car load of heading bolts to be shipped by the defendant to Poplar Bluff, Mo.; that, as soon as he had placed said heading bolts at the switch aforesaid, he made verbal demand upon J. B. Price, agent of the said defendant, on the 20th day of July, 1901, at Moark, Ark., the nearest station to the switch aforesaid, and daily thereafter, and two conductors, and made verbal demand of, about the same time, Hunter and Ray, operating a local freight train of the defendant on the division of the said road in which said switch is located, for a suitable car to ship the heading bolts, and wrote the train master two or three letters; that said defendant failed, neglected, and refused to furnish the car aforesaid to this plaintiff, though often requested by him so to do, for the period of fifty days; that said company negligently failed to furnish car aforesaid, this plaintiff loaded the said bolts in the car that had been ordered by some one else, and after the said bolts were loaded the car was negligently permitted to stand upon the side track for the period of five days thereafter. Plaintiff states that by reason of negligence of the defendant aforesaid, in failing to furnish the car aforesaid, and in delaying of shipment of the said bolts, the said bolts deteriorated in value, to his great damage, in the sum of \$50." Wherefore plaintiff prays judgment for \$50 and proper relief. From

*As to what delays will render the carrier liable for loss or injury to freight, see *McKenzie v. Michigan Cent. R. Co.* (Mich.), 12 R. R. R. 830, 35 Am. & Eng. R. Cas., N. S., 830; *Southern Ry. Co. in Kentucky v. Railey Bros.* (Ky.), 11 R. R. R. 494, 34 Am. & Eng. R. Cas., N. S., 494.

St. Louis, etc., Ry. Co. v. Moss

the judgment rendered in the justice of the peace court against this appellant an appeal was taken to the circuit court. In the circuit court the defendant filed a demurrer to the complaint, stating that the same did not state facts sufficient to constitute a cause of action, which, being submitted to the court, was by the court overruled, and defendant, declining to plead further, stood on its demurrer. Whereupon the case was submitted to a jury, and a verdict rendered for \$48.50, and judgment entered accordingly.

B. S. Johnson, for appellant.

WOOD, J. (after stating the facts). The complaint failed to state a cause of action for failure to furnish cars, for the reasons mentioned in *Ry. v. Carl Lee*, 69 Ark. 584, 65 S. W. 99. But the latter part of the complaint, to wit, "that said company negligently failed to furnish car aforesaid, this plaintiff loaded the said bolts in the car that had been ordered by some one else, and after the said bolts were loaded the car was negligently permitted to stand upon the side track for the period of five days thereafter. Plaintiff states that by reason of negligence of the defendant aforesaid, in failing to furnish the car aforesaid, and in delaying of shipment of the said bolts, the said bolts deteriorated in value, to his great damage, in the sum of \$50"—taken in connection with the first part, states a cause of action for negligent delay in shipping appellee's goods. For it may be fairly gathered from this part of the complaint that appellee, after failing to get the car he had requested, loaded his heading bolts on another car (one "that had been ordered by some one else"), and that, after the bolts had been loaded on appellant's car, appellant negligently delayed their shipment for five days, and that, by reason of such negligent delay in shipment, appellee was damaged, etc. It is true, the complaint does not charge specifically that the appellant received the bolts for shipment, and negligently delayed for five days to ship same, and thereafter did ship same. But this is the reasonable and fair inference from the language used. The complaint, to be sure, was clumsy and defective as a statement of a cause of action for the negligent delay in shipment of appellee's head bolts; but the liberal rules of pleading under our reform procedure require that such defects be remedied by motion, and not demurrer, since a cause of action was stated. In *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783, it is held (quoting the syllabus) that, although the material allegations of a pleading are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment that facts exist sufficient to constitute a cause of action or ground of defense, the defect must be corrected by a motion to make more definite and certain, and not by demurrer."

The judgment is affirmed.

WILLWORTH v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 19, 1905.)

[74 N. E. Rep. 333.]

Injury to Elevated Railway Passengers—Negligence—Construction of Car or Platform.*—In an action by a passenger on an elevated railway for injuries sustained by getting her foot through the space between the car and the platform while alighting, it appeared that the car was constructed with a door on the side through which passengers passed out of the car, and that the platform was on a level with the floor of the car. The space between the car and the platform was three inches when the car stood still, while when in motion there might be an oscillation causing the space to vary from one to five inches in width. The oscillation was a necessary incident to the operation of the car, and it would not be safe to have the platform nearer. Held insufficient to show negligence in the construction of the car or platform.

Same—Same.—It is not negligence to ask passengers leaving an elevated railway car to move quickly.

Same—Same—Failure to Prevent Crowding of Alighting Passenger.†—In an action by a passenger on an elevated railway for injuries sustained by getting her foot through the space between the car and the platform while passing out of the car at a side door, plaintiff testified that she was passing out in a crowd so great that she could not turn around, that she went out practically sideways, and that in this way her foot went down between the car and platform. Defendant had no reason to expect anything unusually dangerous. It did not appear that the passengers were disorderly, or that they were doing anything calling for interference by it. Held not to show that defendant was guilty of actionable negligence in not taking measures to prevent the crowding.

Reported from Supreme Judicial Court, Suffolk County;
Edgar J. Sherman, Judge.

Action by May E. Willworth against the Boston Elevated Rail-

*As to a carrier of passengers' duties and liabilities with respect to vehicles, see foot-note appended to *Kentucky & I. Bridge & R. Co. v. Shrader* (Ky.), 13 R. R. R. 611, 36 Am. & Eng. R. Cas., N. S., 611; foot-notes appended to *St. Louis Southwestern Ry. Co. of Texas v. Parks* (Tex.), 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688.

†As to a carrier of passengers' duties with respect to the safety of stations, platforms, and other stopping places, see *Hart v. Seattle R. & S. Ry. Co.* (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; foot-notes appended to *Topp v. United Rys. & Elec. Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 13 R. R. R. 295, 36 Am. & Eng. R. Cas., N. S., 295.

As to the care due alighting passengers, see foot-notes appended to *Cain v. Louisville & N. R. Co.* (Ky.), 14 R. R. R. 376, 37 Am. & Eng. R. Cas., N. S., 376; *Topp v. United Rys. & Elec. Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; *McDonald v. City Elec. Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736; *Rutledge v. New Orleans, etc., R. Co.* (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488; *Meade v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 13, 34 Am. & Eng. R. Cas., N. S., 13.

Willworth v. Boston Elevated Ry. Co

way Company. The presiding judge directed a verdict for defendant, and reported the case to the Supreme Judicial Court. Judgment on verdict.

Curtis G. Metzler and Donald B. Ward, for plaintiff.

Russell A. Sears and Hugh Bancroft, for defendant.

KNOWLTON, C. J. The plaintiff was a passenger on the defendant's elevated railway, and in passing from the car to the platform at a station she got her foot through the space between the car and the platform, and was injured. The car was constructed according to the description in *Hannon v. Boston Elevated Railway Co.*, 182 Mass. 425, 65 N. E. 809, with a wide sliding door on the side, half way between its ends, through which the passengers passed out of the car, and with doors at the end through which others entered. The platform was on a level with the floor of the car. The plaintiff testified that the space between the car and the platform was from three to four inches in width. The defendant offered evidence, which was uncontradicted, that the space between the car and the platform was three inches wide when the car stood absolutely vertical, and that in the ordinary operation of the train there might be an oscillation from side to side of two inches, causing the space between the car and platform to vary from one to five inches in width, according to the manner of the tilting of the car. The defendant offered evidence that this oscillation was a necessary incident to the operation of the train, and that it would not be safe to have the platform of the station any nearer than this was to the side of the train. There was testimony that the car was very much crowded, and that the guard on the platform told the passengers, "as he usually does," to "step lively," or "move quickly." The plaintiff testified that she was passing out in a crowd so great that she could not turn around, and that "she went out practically sidewise, instead of going straight forward," and that in this way her foot and leg went down between the car and the platform, nearly to the knee. This was substantially all the evidence. There is nothing to show negligence of the defendant in the construction of the car or the platform. The jury would not have been warranted in finding on this evidence that a safer or better way of passing from the car to the platform could have been provided. There was no suggestion either in evidence or in the argument of any safer practicable method of passing that would enable the defendant to give the people rapid transit. No intelligent person could fail to know that the car and the platform were separate and independent structures, and that necessarily there must be a space of greater or less width between them. No one reasonably could expect that the space would be less than three or four inches. In *Ryan v. Manhattan Railway Co.*, 121 N. Y. 126, 23 N. E. 1131, it appeared that the plaintiff suffered in a similar way, and that the space between the car and the platform was much greater than in this case, the station being located

Baltimore & O. R. Co. v. Hubbard

and the platform built on a curve. It was held that there was no evidence of negligence on the part of the defendant. See also, *Welch v. Boston Elevated Ry. Co.*, 187 Mass. 118, 72 N. E. 500.

It was not negligence for the guard on the platform to ask the passengers to move quickly. *Hannon v. Boston Elevated Ry. Co.*, *ubi supra*. The nature of the business in which the defendant is engaged and the convenience of its passengers, who cannot afford an unnecessary loss of time, justify efforts to make the transfers at stations quickly.

Nor is it shown that the defendant was in fault in not taking measures to prevent the passengers from crowding in passing out at this broad side door. There was no reason to expect anything unusually dangerous on this occasion. It does not appear that the passengers were disorderly, or that they were doing anything that ordinarily would call for interference by the railroad company. Indeed, the plaintiff seems to have been familiar with the ordinary method of alighting, and with such dangers as attended it, for she testified that the guard "hollered out as he usually does." She must have known that there was an open space between the car and the platform, over which she must pass, and in the exercise of due care, she should have directed her steps accordingly. We are of opinion that the ruling was right.

Judgment on the verdict.

BALTIMORE & O. R. Co. v. HUBBARD *et al.*

(Supreme Court of Ohio, April 11, 1905.)

[74 N. E. Rep. 214.]

Carriage of Live Stock—Limiting Liability—Lower Freight Rate—Agreed Valuation—Validity of Contract.*—Where a shipper of horses signs a contract with a railroad company for their carriage, containing the following stipulation: "That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of twenty-two cents per hundredweight, which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of said carrier or connecting carriers or their employees, or otherwise. If horses or mules, not exceeding one hundred dollars each"—and the contract is not induced by fraud, concealment, or deception, but is fairly made,

*See foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504; *Ragsdale, Harper & Weathers v. Southern Ry. Co.* (Ga.), 12 R. R. R. 120, 35 Am. & Eng. R. Cas., N. S., 120; foot-notes appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

Baltimore & O. R. Co. v. Hubbard

the same will be upheld as a just and reasonable method of fixing a due proportion between the amount for which the carrier becomes responsible and the freight he receives, and also of protecting himself against extravagant valuations in case of loss; and recovery for loss or damage will be limited to the amount of valuation named, even if the damage or loss occurs through the negligence of such carrier or his servants. To charge the jury to the contrary is error.

Same—Filing Claim for Damages—Sufficiency of Evidence—Instruction.†—On the facts disclosed in this case the court did not err in refusing to charge, that “if the jury finds from the evidence that the horse of plaintiffs was transported from Warren to Lodi, Ohio, under and by virtue of a written contract; that said contract embodied all of the terms for the transportation of said horse; and that said contract provided, among other things, that a claim in writing, verified by an affidavit of the agent or shipper, should be filed with the agent at Wooster, Ohio,” within five days from the time said stock is removed from the car in which it was shipped, “before any liability could exist on the part of the defendant for the loss or damage to said horse, or before the plaintiffs could sue for such loss or damage—then the filing of said claim, verified by said affidavit, is a condition precedent to the right of plaintiffs to recover in this case; and, if the jury finds from the evidence that no such claim or affidavit was ever filed with the agent of defendant at Wooster, there can be no recovery in this case.”

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by Hubbard and others against the Baltimore & Ohio Railroad Company. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Reversed.

On and before the 8th day of September, 1900, the defendants in error were the owners and in possession of a brown horse (gelding) called “Fred S.,” and known as a race horse by that name, which the owners alleged was worth the sum of \$1,200. On the day above named the said owners delivered to the Pittsburgh & Western Railway Company, at its station at Warren, Trumbull county, Ohio—said railway company being then and there a common carrier of passengers and freight—the said horse, with two others, which said company then and there agreed to safely convey over its own road and that of the Baltimore & Ohio Railroad, and safely deliver to C. F. Frazier, one of said owners, defendants in error, at Wooster, Ohio, for the freight charge of \$22, which they prepaid to the Pittsburgh & Western Railway Company at Warren, Ohio. It is further alleged that the Baltimore & Ohio Railroad Company, for and in consideration of a part of the freight money so paid to the Pittsburgh & Western Railway Company, at the city of Akron, assumed and agreed with the owners of the horses to complete the performance of the contract originally made by the latter company for the transportation of said horses from the city of Warren, Ohio, to the city of

†For the authorities in this series on the subject of notice of claims against railroad companies, see foot-note appended to *Chicago, B. & O. R. Co. v. Hammond* (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 561.

Baltimore & O. R. Co. v. Hubbard

Wooster, Ohio, and that the Baltimore & Ohio Railroad Company, at the city of Akron, undertook and entered upon the performance of said contract. The Pittsburg & Western Railway Company, using one of the cars of the Baltimore and Ohio Company, carried the horses over the line of the former to Akron, and which arrived at that city the same day of the shipment, and there the car containing the three horses was taken charge of by the Baltimore & Ohio Company, and carried over one of its lines to Lodi, and it afterwards conveyed two of said horses over another branch of its lines to the city of Wooster. It is alleged that the Baltimore & Ohio Company did not complete the performance of the contract which it had agreed and undertaken to complete, and did not safely convey and deliver the horse Fred S., but, on the contrary, the latter company was guilty of negligence, in that, when the car containing said horses arrived at Lodi, the agents and servants of the Baltimore & Ohio Company negligently caused and permitted an engine and cars to come in collision with the car containing said horses, with great force and violence, thereby throwing said horse Fred S. down to and upon the floor of the car, then and thereby inflicting such injuries upon him as to cause his death within a short time thereafter, to the damage of the owners in the sum of \$1,200. The said horse was never delivered to its owners at Wooster or to C. F. Frazier, and they prayed for judgment in said sum as the value of the horse so injured and killed.

The plaintiff in error answered the petition containing the foregoing facts, and admitted its corporate capacity as a common carrier of passengers and freight, and that the plaintiffs below, at the time they alleged, delivered to the Pittsburg & Western Railway Company at Warren, Ohio, the three horses for shipment over its line to Akron, Ohio, and thence over branch lines of the Baltimore & Ohio Railroad to Wooster, there to be delivered to C. F. Frazier, and that the Baltimore & Ohio Company, when the car containing the horses reached Akron, took charge of the car and agreed to convey it over its lines to Wooster, and did convey it to Lodi, and afterwards transported two of the horses to Wooster. The answer then denies all other allegations of the petition. The answer pleads a special contract in writing for the shipment of the horses, entered into between the plaintiffs below and the Pittsburg & Western Railway Company, in entering into which contract said railway company was acting for itself, and also in behalf of any connecting carrier, by the terms of which contract, in consideration of a freight rate of 22 cents per hundred weight, which was a lower rate than usual and the published tariff rate for carriage of live stock, said plaintiffs agreed that the Pittsburg & Western Railway and any connecting carrier should receive and transport said horses upon the express condition that they assumed a liability to the extent only of an agreed value of \$100 for each horse, beyond which valuation neither of said carriers should be liable in any event,

Baltimore & O. R. Co. v. Hubbard

whether loss or damage should occur through the negligence of either of said carriers, their employees, or otherwise. The answer sets out another provision of the contract, to the effect that no claim for damages which might accrue to plaintiffs under said contract should be allowed or paid by said carrier or connecting carrier, or be sued for by the plaintiffs, unless a claim for such loss or damage should be made in writing, verified by the affidavit of the shipper or his agent, and delivered within five days from the time said horses should be removed from the car; that, if any loss or damage should occur upon the line of any connecting carrier, it should not be liable unless a claim should be made in like manner, and delivered in like time to some proper officer or agent of the carrier upon whose line the loss or injury should occur. The defendant below further avers that the owners of these horses had the option of shipping them at a higher rate of freight, according to the official tariff classifications and rules of the Pittsburg & Western Railway Company and connecting carriers, but the plaintiffs voluntarily decided to ship the horses under the contract set out, on its conditions, at said reduced rate of freight. It is further alleged in the answer that the defendant unloaded the injured horse at Lodi at request of the agent of plaintiffs, that it might be cared for, and that no claim in writing, verified by affidavit, for any loss or damage, was made by plaintiffs, or either of them, or by any one in their behalf, within the five days specified in said contract of shipment.

The reply makes some admissions, but denies all other allegations of the answer which are not admissions of the allegations of the petition. It denies the execution and delivery of the special contract set out in the answer, and it denies the right of the railway company to limit the time for the presentation of claims occasioned by its negligence to the period of five days. The reply further states that said horse Fred S. was shipped by said C. F. Frazier, who was unable to read writing or printing, and unaccustomed to transact business requiring knowledge of reading and writing; that the alleged limitations and restrictions contained in the alleged contract were obscurely printed in very fine type, together with a large number of other limitations; and that said Fraizer could not read the same, and his attention was not called thereto, and the limitations were entirely unknown to him, and said limitations were unknown to his coplaintiff, Hubbard, and that neither of them ever assented to the terms of limitations contained in the alleged contract.

On the issues joined the cause was tried to a jury. At the close of the evidence introduced by the plaintiffs, the defendant company moved the court to direct a verdict in its favor, which was overruled and exception noted. At the close of all the evidence the motion was renewed and overruled.

The defendant company requested 13 special charges. Those being here material are 1, 2, 3, and 4. The others will be sufficiently and generally noticed in the opinion:

Baltimore & O. R. Co. v. Hubbard

“(1) If the jury finds from the evidence that plaintiffs' horse was shipped under contract known in this case as 'Defendant's Exhibit 1,' then no recovery can be had in this case for more than \$100, even though the jury finds from the evidence that said horse was injured through the negligence of the defendant.

“(2) If the jury finds from the evidence that the horse of plaintiffs was shipped under special contract known in this case as 'Defendant's Exhibit 1,' and it is provided in said contract that no claim for damages which may accrue to shipper under said contract shall be allowed, be paid, or sued for in any court by the shipper, unless a claim for said loss or damage shall be made in writing, verified by affidavit of the shipper or his agent, and delivered to the agent of the defendant at his office in Wooster, Ohio, within five days from the time said stock was removed from the car in which it was shipped, and the jury finds from the evidence that no claim for loss or damage to the horse of plaintiffs was ever filed with said agent at Wooster, together with an affidavit by said shipper or his agent, then there cannot be any recovery in this case.

“(3) If the jury finds from the evidence that the horse of plaintiffs was transported from Warren to Lodi, Ohio, under and by virtue of a written contract; that said contract embodied all the terms for the transportation of said horse; and that said contract provided, among other things, that a claim in writing, verified by an affidavit of the agent or shipper, should be filed with the agent at Wooster, Ohio, before any liability could exist on the part of defendant for the loss or damage to said horse, or before the plaintiffs could sue for such loss or damage—then the filing of said claim, verified by said affidavit, is a condition precedent to the right of plaintiffs to recover in this case; and, if the jury finds from the evidence that no such claim or affidavit was ever filed with the agent of defendant at Wooster, there can be no recovery in this case.

“(4) If the jury finds from the evidence that plaintiffs' horse was transported from Warren to Lodi, Ohio, under and by virtue of a written contract between defendant and plaintiffs, and that it was agreed in said contract that the value of plaintiffs' horse was \$100, and that defendant should not be liable in any event for more than said sum in case of loss or damage to said horse, whether said loss occurred through the negligence of defendant or not, then plaintiffs cannot recover in this case more than \$100, even though the jury finds from the evidence that defendant negligently caused the death of said horse.”

These charges were refused, and exception taken. The fifth request was given. Exception was taken to the general charge.

The jury returned a verdict for the sum of \$1,200 in favor of the plaintiffs. A motion for new trial was overruled, and judgment entered on the verdict. This judgment was affirmed by the circuit court, and the railroad company prosecutes error to reverse both judgments.

Baltimore & O. R. Co. v. Hubbard

Kline, Tolles & Goff, for plaintiff in error.

E. J. Pinney and Hoyt, Munsell & Hall, for defendants in error.

PRICE, J. (after stating the facts). Considerable argument is made in the brief of plaintiff in error regarding the form of action assumed in the petition against it in the court of common pleas. It was urged in that court and it is argued here that the action was and is upon a written contract, for the breach of which recovery was sought, and it appears from several averments of that pleading that a contract for shipment of the horses from Warren, Ohio, to Wooster, of the same state, and their safe transportation and delivery to C. F. Frazier, one of the owners, was entered into by the Pittsburg & Western Railway Company and the defendants in error, and that this contract was binding not only upon that company, but on its connecting lines, and that when the horses reached the lines of the latter company it undertook, under said contract, to safely carry and deliver the animals to C. F. Frazier, at Wooster; that breach was made, in that the latter company did not properly care for one of the horses, known as "Fred S.," and through the negligence and wrongful acts of its employees the said horse was so injured at Lodi that his death resulted. Such is the substance of the averments referred to. But the petition does not allege that the contract was reduced to writing. It was disclosed in the evidence of Frazier that there was some writing signed upon the subject. The railroad company insisted that, when it appeared there was a written contract for the shipment, it must be produced and put in evidence by the plaintiff before he was entitled to recover. The plaintiffs below did not introduce any written contract, and when their case was rested the defendant moved the court to direct a verdict in its favor, which the court declined to do. In this we think no error was committed. It must be remembered that the reply denies that the contract pleaded in the answer was ever executed by the plaintiffs or Frazier, and in his testimony Frazier insisted he had not signed such contract; that he had signed no paper except the bill of lading. As long as that matter was in dispute by the pleadings and also in the evidence, it would have been error to have granted the motion. The plaintiffs had introduced evidence tending to establish a liability. The defendant then introduced its Exhibit 1, and gave evidence tending to prove that it was the contract executed by the parties for the transportation of the horses.

The plaintiffs contended that their action was not founded on contract, but sounded in tort, and they were not required to prove a contract in writing or parol. It seems that the trial court took this view of the case, and charged the jury "that the action is not based upon contract for shipment, but is based on specific acts of negligence, or wrongful conduct of the defendant's servants and employees in operating a car against the car in which the horse was, with such force and violence as to cause an injury and

Baltimore & O. R. Co. v. Hubbard

death to the horse. * * *” For the purposes of this proceeding in error, it is not very material which theory of the action is correct. The alleged contract became a part of the evidence, although introduced by the defendant. If the action was on a contract for safe carriage and delivery, the breach consisted in the negligent acts of the employees of the defendant which caused the injury. If the action sounded in tort, the same acts of negligence constituted the tort, and we pass the questions so fully discussed by counsel without further observation, and take up the material ground of controversy.

The testimony introduced by the plaintiffs tended to prove that the value of the race horse Fred S., at the time of his injury and death, was \$1,200. The contract known as “Defendant’s Exhibit 1,” and which was introduced by defendant company, had the following important provision:

“Uniform Live Stock Contract. Warren, Ohio, Station, Sept. 8, 1900. This agreement made this eighth day of September, 1900, by and between the Pittsburg & Western Railway Company, hereinafter called the carrier, and C. F. Frazier, hereinafter called the shipper, witnesseth: That the said shipper has delivered to said carrier live stock of the kind and number, and consigned and destined by said shipper as follows: Consignee, destination, etc., C. F. Frazier, Wooster, Ohio. Number and description of stock, 3 horses—weight subject to correction, 10,000. * * *

“That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of twenty-two cents per hundred-weight, which is the lower published tariff rate based upon the express condition that the carrier assumes liability on said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of said carrier or connecting carriers or their employees, or otherwise.

“If horses or mules, not exceeding one hundred dollars each.”

Then follows a provision for the carriage of the person in charge of the stock. Next is the provision: “C. F. Frazier does hereby acknowledge that he had the option of shipping the above live stock at a higher rate of freight according to official tariffs, classifications and rules of the said carrier and connecting lines, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and ships, and has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.” This contract was signed by the Pittsburg & Western Railway Company by its station agent, and it bears thereunder the name of C. F. Frazier.

Pleading this contract, and introducing it in evidence, the de-

Baltimore & O. R. Co. v. Hubbard

fendant company claimed and now claims that, if liable at all to the plaintiffs, the liability did not exceed the sum of \$100. The plaintiffs below claimed, and claim here, that Frazier did not execute the contract, and that, if he did, it is invalid and against public policy. Whether he executed the contract on behalf of the owners of the horse was a question of fact for the determination of the jury under the rules of law as we shall hereafter determine them. Hence the legal question arises, is the stipulation relied upon by the carrier in this case valid in law, if properly signed? Is it competent for the railroad company to thus limit the amount of its liability for loss or damage in consideration of the reduced rate of transportation? It is not a contract of exemption from liability for the negligence or wrongful conduct of the company or its employees, and its terms cannot be construed to provide for any such exemption. If it did undertake to so provide, it would be condemned as invalid by a uniform current of authority. A common carrier cannot save itself from liability for its negligence and wrongful acts by any contract to that effect. But that is not the question here, and it seems that the trial court needlessly confused our question with the well-settled law as above stated. The railroad company is not striving to escape payment of any sum on account of its negligence, but to limit the amount of recovery to an agreed valuation in case of loss or damage as the result of its negligence or otherwise.

It is urged that, under the law as held by the courts of this state, no such limitation is valid, and the following cases are cited: *Davidson v. Graham et al.*, 2 Ohio St. 132, 133; *Graham & Co. v. Davis & Co.*, 4 Ohio St. 362, 62 Am. Dec. 285; *Welsh v. Railroad Co.*, 10 Ohio St. 65, 75 Am. Dec. 490. We think neither case holds what is contended for it. Instead of reviewing each of them, it will be sufficient to adopt the remarks of Scott, J., in *Welsh v. Railroad Co.*, 10 Ohio St. 65, 75 Am. Dec. 490, where he comments on *Davidson v. Graham et al.*, *supra*, and *Graham & Co. v. Davis & Co.*, *supra*. On page 70 of 10 Ohio St. (75 Am. Dec. 490), it is said, after referring to those cases: "But that the liability of the carrier may be qualified and limited by special contract is well settled. It is true that even this right was denied upon grounds of public policy, in New York, in the case of *Cole v. Goodwin*, 19 Wend. 254, 32 Am. Dec. 470, and in the subsequent case of *Gould v. Hill*, 2 Hill, 623. But these cases have since been overruled. * * * The authority of *Gould v. Hill* was also denied by the Supreme Court of the United States in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465. That such restriction may be provided for by contract has been affirmed in this state in the cases already referred to, in 2 and 4 Ohio State Reports." Throughout the opinion, especially on pages 74 and 75 of 10 Ohio St. (75 Am. Dec. 490), the doctrine of the former cases was restated and adopted, to the effect that while a common carrier cannot relieve himself to any extent, by special contract, from losses oc-

Baltimore & O. R. Co. v. Hubbard

casioned by his own neglect, he may by "contract restrict his liability as an insurer against losses arising from mistake or unavoidable accident, against which human prudence could not provide." This, of course, does not include the right of the carrier to arbitrarily limit liability for either acts of negligence, or the amount of liability in case of loss of or damage to the property consigned. Nor does it extend to mere notices given by the carrier to the shipper that a limited liability is being contracted for when the shipment is made. The transaction must amount to a contract on the subject, wherein the minds of the parties meet as in the making of other contracts.

We have also considered the case of *United States Express Co. v. Bachman*, 28 Ohio St. 144. It does not determine our question, nor does it purport to modify or overrule the earlier cases already noticed. In fact, the validity of the precise stipulation contained in the contract under consideration in this case has not been passed on by this court. There are important facts in *Express Co. v. Bachman*, *supra*, which distinguish that case from the one before us. One of the facts in that case, and which was regarded as material, is that, while the bill of lading provided that the carrier should not be liable beyond an amount named therein, it was understood by the parties that the sum so agreed on as to the amount of liability was much less than the value of the goods. On page 150 of the opinion this court quotes from the bill of exceptions the following: "It was admitted by the defendant that the whiskey in question, at the time and place of shipment, was of much greater value than \$20 per barrel, and that the defendant knew that fact at the time." The case at bar is different. The contract relied on by the railroad company is not a bill of lading, although such a bill did accompany the special contract, and was issued at the same time. The value alleged to have been agreed upon in the special contract was \$100 for each of the horses. There is nothing in the record that it was made known to the agent of the company where the shipment was made that the horses were race horses of peculiar or greater value, and for the ordinary, common horse the value agreed upon would not be regarded as unusual; and it may be inferred from the facts, or rather want of facts, in the record, that the carrier was undertaking to carry horses of the value stipulated. On page 156 of 28 Ohio St., in *Express Co. v. Bachman*, the court gave weight to the fact in that case that the carrier admitted that the whiskey was worth much more than \$20 per barrel, and said: "Carriers may by contract limit their liability at common law for damages or loss arising from other cause than negligence of themselves or their servants. They cannot, however, as liquidated damages, where it is understood by the parties the sum agreed on is less than the value of the goods, determine in advance the quantum of damages for loss occasioned by negligence." We think the points of difference between that case and the one at bar are sufficiently prominent to minimize its influence upon our judgment.

Baltimore & O. R. Co. v. Hubbard

Another and later case is cited. *Railway Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732. Our exact question was not involved in that case, as will appear from its statement of facts, and from the opinion of Williams, C. J.

Counsel for defendant in error cite *Adams Express Co. v. Schwab & Bro.*, 53 Ohio St. 659, 44 N. E. 1135. It is an unreported case affirming the lower court; Shauck, Burket, and Spear, JJ., dissenting. It is not clear on what ground the judgment was affirmed, and we are not at liberty to speculate concerning the reasons for the affirmance.

Pennsylvania Co. v. Yoder et al., 25 Ohio Cir. Ct. R. 32, is also cited. We are aware that the circuit courts of the state are not in harmony on the question before us, and have reached conflicting judgments, as is shown by *Railway Co. v. Simon*, 15 Ohio Cir. Ct. R. 123. Those two cases are in direct conflict, and cannot be reconciled.

Having noticed in a brief way the preceding decisions in this state, we are inclined to think that the conclusions we reach are not in conflict with former holdings of this court, although some of the latter are not entirely clear as to their scope. In this case, besides the bill of lading, the railroad company pleads and contends that, in consideration of a reduced freight rate for the transportation of the horses, their owner entered into a written special contract with the company, wherein a valuation for shipping purposes was agreed upon, beyond which the company would not be liable for loss or damage on account of negligence or any event. The value so agreed upon was not known to be unusually low and below their real value. The shippers, under this contract, if they made it, obtained a low rate of transportation, for which they were willing to allow the carrier to place a money limit on its liability. It is not a stipulation to exempt from liability for negligence, but a limit on the amount of liability for which the carrier should respond in case of loss or damage. "This limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced upon the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contract, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." So said the Supreme Court of the United States in *Hart v. Railroad Co.*, 112 U. S. 340, 341, 5 Sup. Ct. 151, 28

Baltimore & O. R. Co. v. Hubbard

L. Ed. 717. The contract there considered is like the one here. That case reviews and discusses the subject thoroughly, and cites the cases arrayed on each side of the controversy. It holds that the greater weight of authority and the better-reasoned cases support the doctrine there announced. If the contract is induced by fraud or deception, or unfairly made and not understood by the shipper, a different rule will govern, as decided by the same cases.

In *Alair v. Railroad Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588, it is held: "The owner of some horses delivered them to a common carrier for transportation under a contract signed by him, stating the terms and conditions upon which the property was to be transported, by which it was agreed 'that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: each horse \$100 * * * such valuation being that whereon the rate of compensation to the company for its services and risk connected with said property is based.' Held that, assuming that the contract was fairly made for the purposes therein expressed (the sums named being approximately the average values of ordinary domestic animals), this was a just and reasonable mode of securing a due proportion between the amount for which the carrier becomes responsible and the freight which he receives, and of protecting himself against extravagant valuations in case of loss, and that the recovery of the owner will be limited to the sums named, even although the loss occurred through the negligence of the carrier or his servants." That case was approved and followed in *Douglas Co. v. Minnesota Transfer Co.*, 62 Minn. 288, 64 N. W. 899. See, also, *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Durgin v. Express Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; and the numerous cases cited in those cases and in brief for plaintiff in error.

Applying the principles indorsed by the many authorities, and which we believe are supported by the better reason, it follows that the trial court erred in refusing to charge the jury as requested in propositions 1 and 4, or giving their equivalent.

The defendant in error Frazier, who was in charge of the horses, denied that he signed any instrument but the bill of lading, and therefore did not sign the special live stock contract pleaded in the answer of the railroad company, and introduced in evidence as its Exhibit No. 1. The reply denies its execution by Frazier. Therefore there was a direct issue on that subject for the jury to try and decide, and it was the duty of the court to properly instruct the jury on that issue, and to say to them that if the contract was fairly entered into by Frazier and the company, no fraud or deception being practiced upon him, it was binding as a limitation on the amount of recovery. But if it was not fairly made and understood, or if Frazier was induced to sign it by fraud, deception, or misrepresentation, then it would

Baltimore & O. R. Co. v. Hubbard

not be binding. And of course, if he did not sign it, or authorize his name to be signed thereto, it would not be binding. Instead of so instructing the jury, the court charged as follows: "I say to you, gentlemen, as a matter of law, no such special contract can be made that would limit the liability of the defendant company as against its own wrongful act or negligence of its servants. So, gentlemen, if you find the facts as I have indicated them to you, you will find for the plaintiffs." We think in this respect the court erred. The instruction was wrong, as the issues were joined, and they called for a different statement of the law of the case.

The plaintiff in error makes another complaint of the trial court. The special contract relied on by it, and the one we have been considering, contains the following provision: "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the agent of the said carrier at his office in Wooster, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." The railroad company asked the court to charge, in two or more forms of expression, to the effect that if the jury should find from the evidence that the horse of plaintiffs was shipped under special contract known as "Defendant's Exhibit 1," which contains the above provision, and the shippers did not comply with it, they could not recover. It is well to look at the facts attending the unloading of the horse from the car, and about which there seems to be no disagreement. The collision of the cars in which this horse was injured occurred at Lodi late Saturday night, September 8th, or early Sunday morning, and he was so injured that it was necessary to remove him from the car on Sunday, at Lodi, in order to receive the attention of a veterinary surgeon, in whose care he was placed. Frazier went on to Wooster, their destination, with the other two horses. Wooster is about 18 miles from Lodi. The horse died on Friday, the 13th, after his injury. This was the fifth day after the animal was removed from the car at Lodi. Hubbard, one of the owners, resided at Ashtabula, Ohio, and was there at the time of the injury. The fate of the injured horse could not be fully determined until his death, on the fifth day after having been removed from the car. If attention of the shippers should be given to the above period of limitation, they were entitled, in all reason, to time enough to know the extent of the loss before filing the claim referred to. If, under the agreed circumstances, the period for filing the claim was unreasonable, the court should so declare it, just as a court should

Adger v. Blue Ridge Ry. Co

decide that an ordinance of a municipal corporation is unreasonable, if it be so. On these facts, and under the circumstances not in dispute, we think the court very properly refused to instruct the jury as requested. As stated by counsel for defendants in error, the owners were entitled to time sufficient to know whether the claim should be for injury to a live horse, or for the value of a dead one.

But for error in refusing the instruction pointed out, and charging to the contrary, the judgments of the lower courts are reversed, and the cause remanded.

Judgment reversed.

DAVIS, C. J., and SHAUCK, CREW, and SUMMERS, JJ., concur.

ADGER v. BLUE RIDGE RY. CO.

(Supreme Court of South Carolina, March 22, 1905.)

[50 S. E. Rep. 783.]

Carriers—Loss of Baggage—Liabilities.*—Where plaintiff applied in good faith for a ticket and transportation of baggage over the line of the initial carrier and the connecting lines, with notice to the agent of no intent to become a passenger on its line, but to take the train at a more distant point, and the agent declined to sell a through ticket, but sold a ticket over it and the connecting line, and received and checked the baggage to its destination, it was liable for the loss thereof.

Appeal from Common Pleas Circuit Court of Anderson County; Townsend, Judge.

Action by Jane W. Adger against the Blue Ridge Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are defendant's exceptions:

"(1) Error of the presiding judge in refusing the defendant's second request to charge, which was as follows: 'The relation of passenger and carrier must exist before the plaintiff can hold the defendant to the strict liability of a carrier. If the plaintiff bought a ticket over the defendant's railroad, not intending to ride upon defendant's train, and in fact did not ride, but bought said ticket for the purpose solely or providing transportation for her baggage over defendant's line, I charge you that the defendant is not liable as carrier of passengers, but, if it received the baggage, is liable only as a gratuitous bailee for gross negligence, which the plaintiff must prove. If he has failed to prove such gross negligence, you should find for the defendant.' Specifications: Said request contained a correct principle of law applicable to the case. The establishment of the relation of passenger

*See generally, foot-note appended to *Battle v. Columbia, etc., R. R. (S. Car.)*, 14 R. R. R. 425, 37 Am. & Eng. R. Cas., N. S., 425.

Adger v. Blue Ridge Ry. Co

and carrier, or shipper and carrier, is essential to holding a railroad company to the strict liability of a common carrier. If, therefore, the plaintiff bought a ticket over the defendant's railroad, not intending to ride thereupon, and in fact did not ride, but bought said ticket for the purpose solely of procuring transportation for her baggage over defendant's line, as matter of law, the relation of passenger (or shipper) and carrier was not created. Under such circumstances, the defendant who received the baggage would be liable only as a gratuitous bailee for gross negligence, which must be proved by the plaintiff.

"(2) Error of the presiding judge in charging the plaintiff's first request to charge, which was as follows: 'The jury are instructed that, under the law in this state, railroads are common carriers.' Specification: Whether a railroad company sustains the relation of common carrier to a person is a question of fact, dependent upon the circumstances of each case. It is not a common carrier from the fact simply that it is a railroad company.

"(3) Error of the presiding judge in charging the plaintiff's second request to charge, which was as follows: 'The jury are further instructed that, when once a carrier receives either baggage or goods for transportation, he becomes, as it were, an insurer, and can only excuse himself from liability by showing that the loss arose from the act of God or the public enemy.' Specification: A carrier who receives either baggage or goods for transportation is not held to the strict liability of a common carrier, unless it appears that the relation of a common carrier *pro hac vice* has been established.

"(4) Error of the presiding judge in charging the plaintiff's third request to charge, which was as follows: 'The jury are further instructed that, under the law in this state, if they find the defendant company received the trunk in question as a common carrier, and undertook to transport the same, then the question for the jury to solve is not a question of negligence, as in the case of an ordinary bailee, but the sole question is whether the defendant has shown that the damage sustained resulted from any one of the causes which would exempt the carrier from responsibility, to wit, the act of God or the public enemy, or other causes to be hereafter mentioned. The rule is that, in an action against a common carrier, the onus is upon the defendant to show the damage complained of was occasioned by causes which exempt it from responsibility, and that it is not enough for it to prove that it was not guilty of negligence, but it used the utmost care and diligence. If, therefore, the jury find from the evidence, of which they are the sole judges, that the plaintiff delivered a trunk to the defendant as a common carrier, to be transported, and if the defendant so received the same, then the onus is upon the defendant to prove that the loss of the trunk arose from the act of God or the public enemy, or a like cause beyond its control.' Specification: The rule announced only applies when the relation of passenger and carrier is established.

Adger v. Blue Ridge Ry. Co

The defendant, as it contended, may as a common carrier receive the trunk in the capacity of gratuitous bailee, with the limited liability of that relation. This request is particularly harmful in connection with the first request.

“(5) Error of the presiding judge in charging the plaintiff’s fourth request to charge, which was as follows: ‘The jury are further instructed that the liability of a common carrier attaches as soon as baggage or goods are received to be transported on any part of the road. If, therefore, the jury find from the evidence that the plaintiff delivered her trunk to the defendant as a common carrier, and received a check therefor, the liability of the defendant as a common carrier commenced as soon as such delivery was made.’ Specification: Under the circumstances stated, the liability of the defendant as a common carrier did not commence until the plaintiff attained and sustained the relation of passenger or shipper of freight.

“(6) Error of the presiding judge in charging the plaintiff’s fifth request to charge, which was as follows: ‘The jury are further instructed that the purchase of a ticket by a person entitled to travel between two stations creates the relation of carrier and passenger.’ Specification: The purchase of a ticket by a person entitled to travel between two stations does not necessarily create the relation of passenger and carrier; certainly not when the passenger has no intention of taking passage upon the cars, as was the case in the present controversy. The relation of passenger and carrier begins when one puts himself in the care of the carrier, or directly under its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier. Such acceptance may be implied from circumstances showing that the person has offered himself to be carried. The intention of being carried is essential.

“(7) Error of the presiding judge in charging the plaintiff’s sixth request to charge the following: ‘It [a baggage check] is a delivery and acceptance, the abandonment of all care of the baggage by the passenger, and the assumption of it by the agents of the carrier.’ Specification: It is no part of a contract of carriage that the passenger abandons all care of his baggage. Emergencies may arise when his care and attention may preserve it from loss, and this the carrier has the right to take into consideration when the contract is entered into.

“(8) Error of the presiding judge in charging the plaintiff’s seventh request to charge, which was as follows: ‘The jury are further instructed that, under the law of this state, in case of loss or damage to any article or articles delivered to any railroad company for transportation, the initial corporation first receiving the same shall in every case be liable, but may discharge itself from such liability by the production of a receipt in writing for the said articles from the corporation from whom it was its duty to deliver the said article or articles in the regular course of transportation. If, therefore, the jury find from the evidence

Adger v. Blue Ridge Ry. Co

that the plaintiff delivered her trunk to the defendant for the purpose of transportation to the city of Charleston, and that the defendant was the initial corporation or the corporation first receiving the trunk, then the defendant is liable, unless it discharged itself from such liability by the production of a receipt in writing for the said trunk from the corporation to whom it was its duty to deliver it.' Specification: (a) The law quoted (section 2176, Code of Laws of 1902) applies to freight and not to baggage. (b) The complaint is based upon the loss of the trunk as baggage, and not as freight.

"(9) Error of the presiding judge in charging the plaintiff's tenth request to charge, which was as follows: 'The jury are further instructed that the law makes it the duty of common carriers to have an agent at every regular station to receive and take charge of baggage or freight. Such agent or baggage master so placed at the station by the railroad company is held out to the public by it as having authority to make arrangements as to what sort of baggage shall be carried by the railroad company, and as to the shipment of baggage or freight; the railroad company having given him the direction and control and the management of the articles of freight, he is, in the eye of the law, so far as the outside public is concerned, authorized and clothed with the authority to make contracts for the transportation of freight or baggage, and to bind the company in that respect. If, therefore, the jury find from the evidence, of which they are the sole judges, that the plaintiff delivered her trunk to the baggage master of the defendant at the station of Walhalla, S. C., and that he received the same, agreeing to deliver it again to the plaintiff at Charleston, S. C., then the defendant is bound by such acts of its baggage master, and is bound to deliver the trunk, or to account for its loss by reason of the exemptions allowed to common carriers.' Specification: It is not within the apparent scope of a station agent's authority to check baggage through to a point not covered by the passenger's ticket, nor to agree to transport baggage for the price of a ticket when it is known that the passenger does not intend to accompany the baggage or take passage at all. The defendant was not, therefore, bound by such contract. At most, it constituted the defendant a gratuitous bailee, liable only for gross negligence, and not a common carrier, with the strict liabilities of that relation. If this be incorrect, then it is submitted that whether the conduct stated was within the apparent scope of the agent's authority was a question of fact, which should have been submitted to the jury.

"(10) Error of the presiding judge in charging the plaintiff's eleventh request to charge, which was as follows: 'The jury are further instructed that it is usually within the apparent scope of the baggage master's employment, when asked by a passenger whether the company takes baggage over a given railroad, to answer the question, and to bind the company by checking it over connecting roads. If, therefore, the jury find from the evidence

Adger v. Blue Ridge Ry. Co

that the baggage master at Walhalla, the agent of the defendant, in answer to the inquiry of the plaintiff, agreed to accept the baggage and check it to be delivered at Charleston, such agreement was within the apparent scope of his authority, and the defendant company is bound thereby.' Specification: It is not within the apparent scope of station agent's authority to check baggage through to a point not covered by the passenger's ticket, nor agree to transport baggage for the price of a ticket when it is known that the passenger does not intend to accompany the baggage or take passage at all. The defendant was not, therefore, bound by such contract. At most, it constituted the defendant a gratuitous bailee, liable only for gross negligence, and not a common carrier, with the strict liabilities of that relation. If this be incorrect, then it is submitted that whether the conduct stated was within the apparent scope of the agent's authority was a question of fact, which should have been submitted to the jury.

"(11) Error of the presiding judge in charging the plaintiff's twelfth request to charge, which was as follows: 'The jury are further instructed that, in declaring for lost baggage, it is not indispensable that it should be alleged that the owner was a passenger on the road with the baggage. The obligation of the public carrier to carry safely and deliver the trunk at its destination was the same whether the plaintiff was a passenger or not. It is therefore not material, in order to fix the liability on the carrier, to allege that the plaintiff was a passenger, and that the trunk was taken as part of her baggage. If, therefore, the jury find from the evidence, of which they are the sole judges, that the plaintiff did not get on the train with the baggage, and was not a passenger on the train from Walhalla to Seneca, this does not relieve the common carrier when liable for the delivery of the trunk.' Specification: The establishment of the relation of passenger and carrier is essential to holding a railroad company to the strict liability of a common carrier. If, therefore, the plaintiff bought a ticket over the defendant's railroad, not intending to ride thereupon, and in fact did not ride, but bought said ticket for the sole purpose of procuring transportation for her baggage over defendant's line, as matter of law, the relation of passenger and carrier was not created. Under such circumstances the defendant, who received the baggage, would be liable only as a gratuitous bailee for gross negligence, which must be proved by the plaintiff.

"(12) The presiding judge erred in charging the plaintiff's thirteenth request to charge, which was as follows: 'The jury are further instructed that, if the carrier accepts baggage for transportation, knowing that the owner was not and did not intend to become a passenger, it would accept it to be carried as freight, and would be liable for it as a common carrier of goods. If, therefore, the jury find from the evidence, of which they are the sole judge, that at the time the baggage was delivered to

Adger v. Blue Ridge Ry. Co

the baggage master, the agent of the defendant at Walhalla, the agent knew that the passenger was not and did not intend to become a passenger on defendant's train from Walhalla to Seneca and beyond, that then the railroad company must be considered as having accepted said trunk to be carried as freight, and would be liable for it as a common carrier of goods.' Specification: (a) Under the circumstances stated, the carrier would be a gratuitous bailee, and not a common carrier. (b) The agent, knowing that the plaintiff did not intend to take passage, had no authority to receive the baggage other than a gratuitous bailee. (c) The plaintiff, having based her action upon the defendant's failure to carry her trunk as baggage, relying upon the relation of passenger and carrier, cannot recover upon the ground that it was freight.

"(13) The presiding judge erred in charging the plaintiff's fourteenth request to charge, which was as follows: 'The jury are further instructed that if the passenger did not accompany the baggage, and this was known in advance to the defendant or its agent, then the defendant had the right to claim compensation in advance, or to postpone his claim until delivery, or to rely on his lien or on the personal responsibility of the owner. The actual payment of the freight in the one case, or the actual liability or lien for its payment in the other, constitute the consideration for the undertaking. If, therefore, the jury find from the evidence that the plaintiff delivered her trunk to the defendant, paying certain compensation in advance, and that the common carrier received it under the liability of a common carrier to transport and safely deliver it in the city of Charleston, accepting the compensation given as satisfactory, or, if not, to rely on his lien upon the trunk or the personal responsibility of the owner for further and additional compensation.' Specification: (a) Under the circumstances stated, the carrier would be a gratuitous bailee, and not a common carrier. (b) The agent, knowing that the plaintiff did not intend to take passage, had no authority to receive the baggage other than a gratuitous bailee. (c) The plaintiff, having based her action upon the defendant's failure to carry her trunk as baggage, cannot recover upon the ground that it was freight."

T. P. Cothran, for appellant.

Smythe, Lee & Frost and *Tribble & Prince*, for respondent.

GARY, A. J. The allegations of the complaint material to the questions presented by the exceptions are as follows: "That on the 3d day of September, A. D. 1903, the plaintiff delivered to the defendant, through its proper and lawful agents, in the town of Walhalla, state of South Carolina, one trunk in good shipping order, to be transported, for valuable consideration then and there paid, either over its own or over connecting railway lines, from the town of Walhalla to the city of Charleston, state aforesaid. That the defendant accepted the same to be so transported,

Adger v. Blue Ridge Ry. Co

and as a receipt therefor gave to the plaintiff a check of the said railway company, designated by the number 6,555. That the defendant, not regarding its duty, did not use proper care therein, but, by the willful misconduct and gross negligence of it and its servants, said trunk, with its contents, has been wholly lost." The answer denies these allegations, and sets up as a defense "that the plaintiff never became a passenger upon defendant's line, the relation of passenger and carrier never existed, and the obligation of a carrier was not assumed by the defendant." The jury rendered a verdict in favor of the plaintiff for \$1,276.60. The defendant appealed, upon exceptions which will be set out in the report of the case.

The uncontroverted facts are that on the 3d of September, 1903, the plaintiff and her husband, Jno. B. Adger, came by private conveyance from the highlands of North Carolina to Walhalla, S. C., for the purpose of returning on the railroad trains to Charleston, S. C. When they arrived at the depot in Walhalla, they found the three trunks on the platform at the station. They requested the defendant's agent to sell them tickets to Charleston and check their baggage to that place, stating that they wanted to go by way of Spartanburg, so as to be able to take a sleeper to Charleston, and also stating to him that in order to take that route it would be necessary for them to go by private conveyance to Seneca, as they wanted to leave their horse and buggy with a friend. The agent told them that he could not sell them tickets to Charleston, but could sell them tickets to Spartansburg, and would check their baggage through to Charleston. The baggage was put on the train, and was seen at Seneca and other points on defendant's road, but one of the trunks failed to reach its destination. They purchased the tickets to Spartansburg with the bona fide intention of getting aboard the train as passengers from Seneca to Spartanburg, and for the purpose of enabling them to have their baggage checked to Charleston. It was their desire and intention that they and their baggage would arrive in Charleston at the same time.

In the early history of railroads, it was held that, as a carrier was only liable for the negligence causing injury to a passenger, it was only liable to that extent for loss of his baggage. The courts have repudiated this doctrine, and a railroad is now held to the strict liability of a carrier of goods. In the early development of railroads it was likewise regarded as necessary for the passenger to accompany his baggage for the purpose of identifying it and receiving it when it reached its destination. This is still necessary in England and other countries, where the system of checking does not prevail. But now carriers in this country frequently refuse to take baggage on trains which carry passengers, and give notice of this fact in their time-tables. The carrier has absolute control over the baggage, after checking it, until it reaches its destination, and may select the particular train upon which it is to be carried. The fact that a person purchasing a

Adger v. Blue Ridge Ry. Co

ticket does not ride on the train does not in itself place the carrier at any disadvantage. The only reasons now existing why a person purchasing a ticket without the intention of taking passage should not be regarded as a passenger are that this relation imposes a liability upon the carrier that would not otherwise exist, and, furthermore, the conduct of the carrier's business might possibly be interfered with, as baggage must necessarily be transported more rapidly than freight. When a person purchases a ticket, there is an implied agreement that he intends to become an actual and not a constructive passenger, and he has no right to change the contract without the assent of the carrier. Good faith is involved in the purchase of the ticket. When, however, it would be inequitable for the carrier to insist upon this implied agreement, it is estopped.

After these general remarks, we proceed to construe the contract in this case, and to determine the relation thereby created between the plaintiff and the defendant. When the trunks were tendered for transportation, the law imposed upon the defendant as a common carrier the duty of carrying them, either as baggage or as freight, upon satisfactory arrangements being made as to compensation. *Mathis v. Ry.*, 65 S. C. 281, 43 S. E. 684. Instead of insisting upon the right to carry the trunks as freight, the defendant recognized and assented to the right of the plaintiff to have them checked as baggage, and thereby elected to assume the liability incident to the transportation of baggage. Was there any consideration for the checks? There are no facts from which it can reasonably be inferred that either the plaintiff or the defendant contemplated the carriage of the trunks by the defendant as a gratuitous bailee; on the contrary, the only reasonable inference is they intended that the price for the ticket should include the consideration for the checks. If the defendant intended to assume the relation of gratuitous bailee, it was its duty to give notice of this fact, when it knew the plaintiff relied upon the price of the tickets as the consideration for the checks. The principle is well settled that the price of a ticket includes compensation for the carriage of such baggage as may be necessary for the personal convenience of the passenger. The plaintiff, by the acquiescence of the defendant was to all intents and purposes a passenger, in so far as baggage was concerned. In the case of *Marshall v. R. Co.* (Mich.) 85 N. W. 242, 55 L. R. A. 650, the court held that one who purchases a railroad ticket for the sole purpose of checking his baggage upon it, with the intention of going to his destination in his private conveyance, can hold the carrier liable only as a gratuitous bailee of the baggage, and cannot recover in case it is stolen from the baggage room, unless the carrier is guilty of gross negligence. There is an exhaustive and vigorous assault upon the doctrine of that case in a note to it, in 85 N. W. 242, 55 L. R. A. 650. The facts of this case are, however, quite different. There was good faith on the part of the plaintiff, and all the facts were made known to the

Commonwealth v. Louisville & N. R. Co

agent. Furthermore, the ticket was not bought solely for the purpose of checking the baggage, as the plaintiff intended to get on board the train at Seneca and ride to Spartansburg en route to Charleston.

This disposes of all the exceptions except the second and seventh. It is only necessary to refer to section 3, art. 9, of the Constitution of 1895, and to the admission in the answer that the defendant is a common carrier, to show that the second exception cannot be sustained. The charge mentioned in the seventh exception was favorable to the defendant. It, therefore, has no ground of complaint.

It is the judgment of this court that the judgment of the circuit court be affirmed.

COMMONWEALTH v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, May 19, 1905.)

[87 S. W. Rep. 262.]

Carriers—White and Colored Passengers—Separate Compartments—Overcrowding of Cars—Prosecution.*—Ky. St. 1903, § 795, requires railroads to furnish separate cars or compartments for white and colored passengers, and section 783 provides that every railroad shall furnish sufficient accommodations for the transportation of all passengers. The latter statute has no penalty, but the former has. Held, that the fact that the accommodations for passengers were insufficient, so that white passengers were compelled to ride in a compartment with colored persons, did not render the railroad liable for a violation of section 795.

Appeal from Circuit Court, Taylor County.

"Not to be officially reported."

Prosecution against the Louisville & Nashville Railroad Company for a violation of Ky. St. 1903, § 795, requiring railroads to provide separate compartments for white and colored passengers. From a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

N. B. Hays, R. L. Durham, and C. H. Morris, for the Commonwealth.

W. C. McChord, Benjamin D. Warfield, and E. W. Hines, for appellee.

NUNN, J. This appeal is from the action of the lower court in sustaining a demurrer to an indictment against the appellee for the violation of section 795 of the Kentucky Statutes of 1903. The indictment, in substance, alleged that appellee violated the statutes by willfully failing to furnish sufficient coaches or cars for the transportation of passengers on the 23d of October, 1903;

*For the authorities in this series on the subject of the duty to furnish separate coaches for white and colored passengers, see footnote appended to *Louisville & N. R. Co. v. Commonwealth* (Ky.), 10 R. R. R. 262, 33 Am. & Eng. R. Cas., N. S., 262.

Commonwealth v. Louisville & N. R. Co

that, from the month of May prior and up to the date named, the appellee ran a regular passenger train from Greensburg to Lebanon, Ky., a distance of 66 miles, and that the cars in this train consisted of a postal and baggage car, with a compartment, used as a smoking car, for about 12 passengers, and also one coach with a partition for white and colored passengers, the white compartment seating 44 and the colored compartment seating 20 persons; that the cars had been taxed to their full capacity from May up to October 23, 1903; that appellee had advertised that it would run a reduced-rate excursion on the last-named date, and that it and its agents in charge knew of the incapacity of the regular train to transport the passengers who would purchase tickets for that excursion, and that notwithstanding this it willfully failed to furnish any additional coach or coaches for that occasion; and that the compartments for white passengers were filled to overflowing, and many of the white passengers were compelled to take seats in the colored compartment.

It appears from the indictment that the appellee did furnish separate coaches or compartments for white and colored people, in compliance with the statutes. The gravamen of the offense charged is that appellee did not furnish a sufficient number of coaches or compartments for that occasion. That part of section 795 applicable to the question involved provides that railroads operating passenger trains in this state "are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act." By section 797 a penalty is provided for a violation of this section. As stated, this prosecution was instituted to enforce this penalty for the violation of that section. It appears from the language quoted from section 795 that the General Assembly intended to force the separation of white and colored people while traveling upon railroads in this state, and that it did not have in mind at the time of the enactment of this section the purpose of fixing a penalty for the failure or neglect on the part of the railroad to furnish a sufficient number of cars or compartments to transport all the white and colored persons who might apply for transportation. In support of our construction of the preceding statute, we refer to section 783, which provides that every railroad company shall furnish sufficient accommodation for the transportation of all passengers who apply therefor. For a failure to comply with the provisions of this statute, the General Assembly failed to fix any penalty. If the construction of section 795 be correct, as contended for by appellant, then section 783, in so far as it applies to furnishing accommodation for the transportation of passengers, is superfluous.

We are of the opinion that the lower court did right in sustaining the demurrer to the indictment, and the judgment is therefore affirmed.

UNITED STATES *ex rel.* MARTIN A. KNAPP, Judson C. Clements, James D. Yeomans, Charles A. Prouty, and Joseph W. Fifer, Interstate Commerce Commissioners, *Plffs. in Err., v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Argued February 28, 1905, decided April 10, 1905.

[25 Sup Ct. Rep. 538.]

Mandamus—Jurisdiction.—A Federal circuit court has no jurisdiction under the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), of original proceedings seeking relief by mandamus.

Same—Same—Act to Regulate Commerce.—Jurisdiction, in a Federal circuit court, of an original proceeding by mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the Act to Regulate Commerce to require, cannot be inferred from the grant of authority to the Commission to enforce that act, or from the direction to district attorneys of the United States or the Attorney General to institute all necessary proceedings for the enforcement of its provisions.

In error to the Circuit Court of the United States for the Northern District of Ohio to review a judgment which dismissed for lack of jurisdiction a petition for a mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the Act to Regulate Commerce to require. Affirmed.

The facts are stated in the opinion.

Mr. L. A. Shaver and Assistant Attorney General *McReynolds* for plaintiffs in error.

Mr. George C. Greene for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court:

Petition for mandamus filed in the circuit court of the United States for the northern district of Ohio by the Interstate Commerce Commissioners against the Lake Shore & Michigan Southern Railway Company. The railway company moved to dismiss the petition on the ground that the court had no original jurisdiction to issue a writ of mandamus. The motion was granted and the writ dismissed. A certificate was duly made showing that a question of jurisdiction was in issue, and recites that the court acted not only on the motion of the railroad, but on its own motion, in dismissing the petition for want of jurisdiction.

The petition alleges that the railroad company is a corporation created by the laws of the states of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois, and has its principal place of business in the state of Ohio, and is a common carrier engaged in interstate commerce, and as such is subject to the provisions of the Act of Congress to Regulate Commerce [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154].

That under § 20 of said act the Interstate Commerce Commission is authorized to require any common carrier subject to the act to make reports of certain matters and things, and in pursu-

United States ex rel. Knapp v. Lake Shore, etc., Ry. Co

ance thereof the Commission made an order on the 3d of June, 1903, prescribing the manner and form in which said reports should be made and the contents thereof, and directed each common carrier to file the same on or before the 15th. A copy of the order was served on the railroad company, but the company failed and neglected to make out and return a report in full, in that it failed to set forth in the report made and returned by it the data or information called for, namely, "the tonnage, ton—mileage, earnings, and receipts per ton per mile on grain, hay, cotton, live stock, dressed meats, anthracite coal, bituminous coal, and lumber carried in carload lots; and that said data or information required by the Commission to be given in said report by respondent is necessary to enable the Commission to perform the duties and carry out the objects for which it was created, in the interest of the public, and that promptness by carriers in furnishing the same on or before the 15th day of September of each year, as required by the Commission, is essential for the purpose, among others, of enabling the Commission to make a full and complete annual report to Congress, which, by § 21 of said Act to Regulate Commerce, is required to be transmitted to said body on or before December 1st of each year."

It is also alleged that there is no adequate remedy except that afforded by mandamus.

It is admitted that under the judiciary act of 1789 (1 Stat. at L. 73, chap. 20) and the act of 1875, as construed by this court, a circuit court of the United States has no jurisdiction of an original proceeding seeking relief by mandamus. And counsel, not to minimize the admission, quotes the cases in which that has been laid down and the text books which have expressed the doctrine as settled. But it is suggested that under the act of 1887 (24 Stat. at L. 552, chap. 373), a different ruling should be made. No change in language is pointed out which would justify such change in ruling, but we are urged to that radical course in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby. We are not impressed by the invocation. We are unable to understand how language conferring jurisdiction on a court can take a new meaning from the circumstances suggested. Difference in remedies is conspicuous in our jurisprudence, and some remedies are of that nature that they can be enforced only under exceptional circumstances and under special grants of power. Of this kind is mandamus, and if Congress had intended by the act of 1887 to confer power on the circuit courts to issue mandamus in an original proceeding, Congress would not have employed the language which had been construed from the foundation of the government not to give such jurisdiction. We adhere, therefore, to the prior cases.

2. Congress has undoubtedly power to authorize a circuit court to issue a mandamus in an original proceeding. *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *United States v.*

United States ex rel. Knapp v. Lake Shore, etc., Ry. Co

Schurz, 102 U. S. 378, 26 L. Ed. 167. But has Congress done so, as contended, by §§ 12 and 20 of the Interstate Commerce Act as amended? Under § 12 the Commission is given the authority to inquire into the management of the business of common carriers subject to the act, and has the right to obtain from the carriers full and complete information to enable it to perform its duties. It is also authorized to enforce the provisions of the act. By § 20 the Commission may require annual reports, and fix the time and prescribe the manner in which such reports shall be made. And it is made the duty of any district attorney of the United States to whom the Commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this act. It is hence contended that the power of the Commission to require the report stated in the petition is undoubted, and, having power to order the report to be made, the Commission has the power to enforce obedience to the order.

But in what way? Manifestly only in such way as the courts have jurisdiction to give. All powers are given in view of that jurisdiction, and the amendments of the Interstate Commerce Act are so framed. Jurisdiction to issue mandamus is conferred by § 6 to enforce the filing or publishing by a common carrier of its schedules or tariffs of rates, fares, and charges. And such jurisdiction is also given to the circuit courts and district courts upon the relation of any person or persons, firm or corporation, alleging a violation of any of the provisions of the act, which prevents the relator from having interstate traffic moved on terms as favorable as any other shipper. The remedy is expressly made cumulative of the other remedies provided by the act. It is clear, therefore, when Congress intended to give the power to issue mandamus it expressed that intention explicitly. Such power cannot be inferred from the grant of authority to the Commission to enforce the act, or from the direction to district attorneys or the Attorney General to institute "all necessary proceedings for the enforcement of the provisions" of the act (§ 12). The proceedings meant are, as we have said, those within the jurisdiction of the court. And special remedies are given. For instance, by § 16 a summary proceeding in equity is authorized, and the form of the ultimate order of the court may be that of a "writ of injunction or other proper process, mandatory or otherwise."

Without attempting now to define the extent of that section, we may say, it seems adequate to enable the Commission to enforce any order it is authorized to make.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

RAISOR v. CHICAGO & A. R. CO.

(Supreme Court of Illinois, April 17, 1905.)

[74 N. E. Rep. 69.]

Wrongful Death—Penal Statute—Enforcement in Another State.*—Rev. St. Mo. 1899, § 2864, providing that defendants, including carriers of passengers, in actions for wrongful death shall forfeit and pay for any person so dying the sum of \$5,000, is penal; and hence an action cannot be maintained in Illinois thereunder for the death of a person from an accident occurring in Missouri.

Same—Compensation—Penalty—Statutes—Public Policy.—Hurd's Rev. St. 1903, p. 1043, c. 70, § 2, providing that in every action for wrongful death the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons entitled to recover therefor, not exceeding \$10,000, establishes the principle that where there has been no pecuniary loss there can be no recovery, and renders Rev. St. Mo. 1899, § 2864, authorizing recovery without proof of pecuniary loss, against public policy.

Error to Appellate Court, First District.

Action by Laura P. Raisor against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court affirming a judgment in favor of defendant, plaintiff brings error. Affirmed.

The following is the statement of the facts in this case made by the Appellate Court:

"Laura P. Raisor, appellant, sued appellee in case for negligence causing the death of her husband, Isaac S. Raisor. The declaration was demurred to by appellee. The court sustained the demurrer, and, appellant electing to stand by her declaration, gave judgment for appellee.

"The declaration contains six counts. It is averred, in substance, that Isaac S. Raisor, appellant's husband, was in the employ of the United States Express Company as a messenger, and July 10, 1901, was engaged in the discharge of his duties as such in the baggage car of defendant's train which was running westerly between Slater and Marshall, in Saline county, in the state of Missouri, and was exercising due care for his personal safety, when a locomotive and train of freight cars of the defendant, approaching in the opposite or easterly direction, were so negligently and carelessly managed and operated by the defendant that the same, at a point between said Slater and Marshall, struck and ran into the train on which said Isaac S. Raisor was being carried, whereby he was struck with great force and violence and was killed.

"In each of the counts except the sixth, the plaintiff pleads sections 2864, 2873, 2875, and 2876 of a statute of the state of

*See foot-notes appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31 (where all the preceding authorities in this series are collected).

Raisor v. Chicago & A. R. Co

Missouri. (Rev. St. 1899.) In the sixth count she pleads only section 2864. The sections so pleaded are as follows:

"Sec. 2864. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant, or employee whilst running, conducting or managing any locomotive, car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat or any of the machinery thereof, or of any driver of any stage coach or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad locomotive, car, stage coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence or criminal intent above declared, shall forfeit and pay for every person or passenger so dying the sum of \$5,000.00, which may be sued for and recovered, first, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased: provided, that if adopted, such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption; or, third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency and that the injury received was not the result of unskillfulness, negligence or criminal intent.'

"Sec. 2873. That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof: provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury.'

Raisor v. Chicago & A. R. Co

“‘Sec. 2875. That all persons who are engaged in the common service of such railroad corporation, and who, while so engaged, are working together at the same time or place to a common purpose of same grade, neither of such persons being entrusted by such corporation with any superintendence or control over their fellow employees, are fellow-servants with each other: provided, that nothing herein contained shall be so construed as to make any agent or servant of such corporation in the service of such corporation a fellow-servant with any other agent or servant of such corporation engaged in any other department or service of such corporation.

“‘Sec. 2876. No contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for any damages under the provisions of this act, shall be valid or binding, but all such contracts or agreements shall be null and void.’ ”

Darrow, Masters & Wilson, for plaintiff in error.

Winston, Payne & Strawn (*F. S. Winston* and *Ralph M. Shaw*, of counsel), for defendant in error.

MAGRUDER, J. (after stating the facts). The following opinion delivered by the Appellate Court for the First District, speaking through Mr. Justice Adams, correctly disposes of the questions involved in this case, and is adopted as the opinion of this court:

“Under the declaration, plaintiff can only recover, if at all, under section 2864, Rev. St. Mo. 1899, and the arguments of counsel for the parties, respectively, are on this hypothesis. The questions argued are whether section 2864 is penal, and whether the enforcement of the section would be contrary to the policy of this state; appellee urging the affirmative, and appellant the negative, of both questions. If the section is penal in its character, it cannot be enforced in this state. Story on Conflict of Laws, § 620 et seq.; *Shedd v. Moran*, 10 Ill. App. 618, 623; *Sherman v. Gassett*, 4 Gilman, 521, 523. In the last case the court say: ‘It is a well-settled rule of jurisprudence that the courts of one country will not enforce either the criminal or penal laws of another.’

“The language of the statute (section 2864) is, ‘shall forfeit and pay for any person or passenger so dying, the sum of \$5,000.00, which may be sued for and recovered,’ etc. The plaintiff is not required to prove any damage, but only that the death was occasioned by such defect, negligence, or criminal intent as is mentioned in the section and averred in the declaration. The declaration in this case is framed on this theory, except the fifth count, in which it is averred that the plaintiff was dependent for support on the deceased, and by his death has been deprived of her means of support. Each count except the sixth contains this averment: ‘That, by reason of the premises and said sec-

Raisor v. Chicago & A. R. Co

tions, the defendant has become liable to pay plaintiff the sum of \$5,000.' The sixth count has the same averment, with the exception that the word 'section,' instead of 'sections,' is used.

"As the statute is administered in Missouri, no proof of damage is required. In *Philpott v. Missouri Pacific Railway Co.*, 85 Mo. 164, the suit was brought by the parents of a minor son, between nineteen and twenty years of age at the time of his death. It was objected that the father had emancipated the deceased, and therefore was not entitled to his earnings, and that the statute was compensatory, and there could be no recovery. The court acceded to the proposition that, if the deceased had been emancipated, the father had no right to his earnings, but said: 'Whether the amount awarded is denominated damages, compensatory damages, liquidated, as was said in *Coover v. Moore*, 31 Mo. 574, or a penalty, is not material. The law, as well as being compensatory, is of a penal and police nature, and can, without objections, serve both purposes at one and the same time.' Thus the court, by the nature of the defense, namely, that no pecuniary loss had been suffered by the plaintiff by their son's death, was forced, in order to sustain the action, to hold that the statute was penal. In *Rafferty v. Missouri Pacific Railway Co.*, 15 Mo. App. 559, which was a suit by parents, under the same section of the statute, to recover for the death of a minor child, the jury, contrary to the instructions of the court, returned a verdict for \$2,500, which the court, on motion for a new trial by the defendant, set aside, saying of the statute: 'It is penal in its nature, and it is right that the carriers and corporations named in it, and against whom a heavy penalty is assessed, which goes to the surviving relatives, in each case of a death caused by the negligence of their servants, should have whatever benefit they may derive under the statute from the size and fixity of the sum named as damages.' Thus the Missouri courts have construed the section as penal.

"By the terms of the statute, and as it is administered in Missouri, whether the plaintiff has or not suffered pecuniary loss or damage is immaterial. His right to recover depends solely on the plaintiff's relation to the deceased and the culpability of the defendant, within the meaning of the statute and as averred in the declaration. From this it necessarily follows that a plaintiff who has suffered no damage, but has even been relieved, by the death, of a pecuniary burden, may recover \$5,000. If, in any case, any part of the amount recovered may be deemed compensatory, this is merely incidental; the primary object of the statute being punitive. The amount recoverable is fixed at \$5,000. No more and no less is recoverable (*Rafferty v. Missouri Pacific Railway Co.*, supra), and this even though the plaintiff has suffered no damage.

"*Marshall v. Wabash Railroad Co.* (C. C.) 46 Fed. 269, decided in 1891, was a suit in the United States Circuit Court based on the statute in question. *Coover v. Moore*, 31 Mo. 574,

Raisor v. Chicago & A. R. Co

and *Philpott v. Railway Co.*, 85 Ill. 164, were cited in support of the proposition that the statute was not penal, in respect to which the court said: 'Now, it is insisted that these decisions settle the proposition that the statute under consideration is not a penal statute, and that this court is bound by those decisions. I do not concur with either proposition. It is true that the court in *Coover v. Moore* say that the damages are compensatory. So they may be in certain cases, and in some cases less than full compensation. But where the plaintiff is not required to offer any evidence proving damages, and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation, merely, and not penal.' The court held as follows: 'I therefore hold that this court has no jurisdiction in this case, upon the well-recognized rule that penal statutes can be enforced only within the sovereignty of their creation, much for the same reason that criminal statutes have no extraterritorial force.'

"In *Matheson v. Kansas City, Ft. Scott & Memphis Railroad Co.*, 61 Kan. 667, 60 Pac. 747, the court refused to enforce the Missouri statute because of its penal character; saying, among other things: 'An arbitrary award of a fixed amount of damages, regardless of pecuniary loss sustained, is antagonistic to our policy, and is palpably inconsistent with our statute authorizing a recovery in such cases. Here the plaintiff must show a pecuniary loss, and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin, no more than nominal damages can be recovered. There have been a number of such cases, an illustration of which may be found in *Atchison, Topeka & Santa Fe Railroad Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, where the jury specially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary forfeiture of \$5,000 in such a case, arising under Missouri statute, would be purely punitive, and the fact that the penalty was bestowed on relatives of deceased would not take away the penal character of the award.'

"A statute of the state of Massachusetts (Pub. St. 1882, c. 112, § 212) provided as follows: 'If, by reason of negligence or carelessness of a corporation operating a railroad or street railway or the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than \$500.00 or more than \$5,000.00, to be recovered by indictment prosecuted within one year from the time of the injury causing death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties, or if

Raisor v. Chicago & A. R. Co

there are no children, to the use of the widow, or if no widow to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to a law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation it shall also be liable in damages not exceeding \$5,000.00 nor less than \$500.00, to be assessed with reference to the degree of culpability of the corporation or its servants or agents, and to be recovered in an action of tort commenced within one year from the injury causing the death, by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in a case of indictment.' The administrator of one L. C. Adams, deceased, brought suit under the last sentence of the section quoted supra in the state of Vermont. *Adams v. Fitchburg Railroad Co.*, 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800. The court held that the statute was penal, and therefore not enforceable in Vermont. The reasoning of the court is, in substance, that the true test whether a statute is penal is whether the main purpose of the statute is the giving of compensation for an injury sustained, or the infliction of a punishment on a wrongdoer, and held that, applying this test, the statute was penal; saying, among other things: 'It appears, then, that whatever the damages may be, or whomsoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained. * * * All these matters which enter into the question of compensation are excluded from the inquiry. The wrongdoer is to be punished whether the person receiving the amount of the recovery has sustained a substantial injury or not. If the beneficiary has in fact received an injury, it is in no way made the basis of the recovery.' This reasoning is equally applicable to the statute in question, and is, as we think, unanswerable. The proof required in the present case is substantially the same as would be required in support of an indictment against the corporation for the alleged negligence.

"In *O'Reilly v. N. E. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719, the court held the Massachusetts statute penal, and refused to enforce it, saying: 'That the liability imposed by the Massachusetts statute is penal is very clear. The damages, as we construe the provision, are directed "to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents," and to the amount of at least \$500. These directions clearly show a punitive purpose.' *O'Reilly v. N. E. R. R. Co.*, 16 R. I. 394, 17 Atl. 908, 5 L. R. A. 364.

"The Supreme Court of Kansas, in *Dale v. Railroad Co.*, 57 Kan. 601, 47 Pac. 521, held a statute of New Mexico substantially the same as the Missouri statute penal, and therefore not enforceable in Kansas.

"Appellant's counsel rely on *Huntington v. Attrill*, 146 U. S.

Raisor v. Chicago & A. R. Co

657, 13 Sup. Ct. 224, 36 L. Ed. 1123, and quote the following from the opinion in that case: 'The rule that courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes.' Minor, in his work on Conflict of Laws, p. 22, note 3, criticises much that is said in the opinion, and on page 24 says: 'So far as private international law is concerned, it matters not whether that punishment is inflicted through the instrumentality of an ordinary prosecution by the state's officers for a fine, or through the medium of a civil action by the party injured for penal damages. In substance, it is an act of punishment. It is punitive in either case.' Such seems to be the view of the court in *Missouri River Tel. Co. v. National Bank*, 74 Ill. 218. In that case the plaintiff declared specially that the defendant, in violation of an act of Congress, received from it, at divers times, interest amounting to \$500 above the rate allowed by the law of Iowa, in violation of an act of Congress, whereby the defendant became liable, under said act, to pay the plaintiff double that sum, namely, \$1,000. The transactions involved occurred in Iowa. The court held that the statute was penal; that, by the act of Congress, jurisdiction was not conferred on this state—and say: 'And it is equally true that both the 'governments of the United States and Iowa are wholly independent of this state. They, severally, have all the attributes of sovereignty essential to the enactment and enforcement of laws for the government of their citizens within the limits of their constitutions, and in accordance with long-settled rules of law this state cannot enforce their criminal or penal laws.' See, also, *Sherman v. Gassett*, supra.

"Is the Missouri statute contrary to the public policy of this state? In order to ascertain the policy of the state in respect to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained. *Carroll v. City of East St. Louis*, 67 Ill. 568, 571, 16 Am. Rep. 632. In 1845 the Legislature adopted as the law of this state 'the common law of England and all statutes or acts of the British Parliament made in aid thereof, and to supply the defects of the common law prior to the fourth year of James the First.' Rev. St. 1845, c. 62, § 1. This includes the common-law forms of actions *ex contractu* and *ex delicto*, and at common law the plaintiff in an action *ex delicto*, or in any action sounding in damages, cannot recover substantial damages without proof that he has suffered such. Two elements must concur to entitle a plaintiff to recover substantial damages—injury and actual damages—and these two must be proved. On proof of injury alone, nominal damages may be recovered, as the law presumes some damage on proof of injury, but there can be no recovery of actual or substantial damage in the absence of proof thereof.

Wilson's Adm'rs v. Chesapeake & O. Ry. Co

But the Legislature has expressed itself with regard to the very subject-matter of the present suit, namely, the death of a person 'caused by wrongful act, neglect or default.' In such case an action may be brought in the name of the personal representative of the deceased, for the benefit of the widow and next of kin. But the statute contains the provision: 'In every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next kin of such deceased person, not exceeding \$10,000.00.' Hurd's Rev. St. 1903, p. 1043, c. 70, § 2. Our statute is substantially a copy of the first two sections of 9 and 10 Victoria (chapter 93), and of the New York statute on the same subject; and it has been held in England, New York, and this state that the pecuniary loss to the widow and next of kin is the sole measure of damages, and that when there has been no pecuniary loss there can be no recovery. *Chicago & Rock Island Railroad Co. v. Morris*, 26 Ill. 400. It is therefore, as we think, contrary to the policy of this state, as evidenced by the acts of the Legislature, to permit a recovery for damages on mere proof of neglect or default of the defendant, and without proof that the plaintiff has suffered any pecuniary loss.

"The judgment will be affirmed."

Accordingly the judgment of the Appellate Court affirming the judgment of the circuit court of Cook county is affirmed.

Judgment affirmed.

WILSON'S ADM'RS v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky, April 25, 1905.)

[86 S. W. Rep. 690.]

Private Crossings—Negligence—Signals.*—Failure of a railroad company to give warning signals at a private crossing is negligence as to persons using such crossing.

Same—Collision—Question for Jury.—In an action against a railroad company for death caused by a collision at a private crossing, evidence held sufficient to justify the submission to the jury of the issue of defendant's negligence.

Crossings—Contributory Negligence—Look and Listen.†—Failure of a person approaching a railroad crossing to look and listen for an approaching train is not necessarily negligence.

Same—Contributory Negligence.—In an action against a railroad for death caused by a collision at a private crossing, evidence held to justify submission to the jury of the issue of decedent's contributory negligence.

Appeal from Circuit Court, Lewis County.

"Not to be officially reported."

*See foot-notes appended to *Defrieze v. Illinois Cent. R. Co.* (Iowa), 5 R. R. R. 69, 31 Am. & Eng. R. Cas., N. S., 69.

†See foot-note appended to *Chicago City Ry. Co. v. Barker* (Ill.), 14 R. R. R. 190, 37 Am. & Eng. R. Cas., N. S., 190.

Wilson's Adm'rs v. Chesapeake & O. Ry. Co

Action by Nancy J. Wilson's administrators against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed.

A. D. Cole and T. R. Phister, for appellants.

Worthington & Cochran and W. H. Wadsworth, for appellee.

NUNN, J. On the 2d of September, 1899, one Nancy J. Wilson was killed by one of appellees' trains. Her administrator brought this action for the recovery of damages therefor. On the trial, and after appellants had introduced their evidence, on motion of appellees the court granted them a peremptory instruction, and the jury rendered a verdict in conformity therewith. Of this the appellants complain. The only question to be determined is whether the appellants introduced any evidence to authorize a recovery. If so, there must be a reversal; otherwise an affirmance.

It is shown in the record that Mason Wilson, the husband of Nancy, owned a tract of land in the Ohio river bottom in Lewis county long prior to the building of appellee railroad; that his dwelling was left between the railroad and the river; that he had a passway from his house out from the river for a long time prior to the building of the road, and, when the railroad was built over this private passway, it made a crossing at that point, and had kept it in repair ever since, and it has been constantly used as a passway. Mason Wilson died many years ago, and left his widow residing at the old home. One of her sons, J. B. Wilson, lived on the other side of the railroad from her, about a quarter of a mile distant, and about 150 yards from the railroad. On the day she was killed she visited her son, and started to return to her home about 2 o'clock p. m., about the time one of appellees' trains was due. She was walking, and was holding with one hand her apron, containing some cantaloupes, and with the other hand an umbrella, and she had on a sunbonnet. Before she reached the railroad track, and while on this traveled road, she had to pass by an embankment of earth which had been placed there by appellees, and which was situated between her and the approaching train. When she reached the first rail she was struck by the engine, and thrown about 45 feet, and instantly killed. There was an effort on the part of appellees to show by the proof that this embankment of earth was not of sufficient height to have prevented her from discovering the approaching train if she had been exercising at the time any care. The appellants endeavored to show by the proof that this embankment was so high, with the weeds growing upon the top of it, that it prevented her from seeing the approaching train. There was evidence that tended to sustain each of their contentions. Appellants proved by many witnesses that there was a public highway crossing the railroad about three-quarters of a mile below this private crossing, and that this train which killed Mrs. Wilson was traveling at not less than 50 miles per hour, and that it did not whistle at this public crossing, nor at the private crossing, until about the moment it struck her. It was also proven that

Wilson's Adm'rs v. Chesapeake & O. Ry. Co

trains occasionally whistled at this private crossing, and that those living on the Wilson farm and using this private crossing were governed in using this crossing by the whistle at the public crossing. There was only one witness introduced who saw her killed, and he stated that he did not notice whether or not she turned her head up or down the track as though looking for the train; and upon this statement the appellees contend that she did not exercise any care in approaching the track, and that she was guilty of contributory neglect, but for which she would not have been killed, and that the peremptory instruction was proper.

It was proven without contradiction that appellees' agents in charge of the train failed to give warning by blowing the whistle or ringing the bell of its approach to the public crossing, and that persons using this private crossing were enabled by such signals to avoid collision with the trains. This court in several cases has decided that failure of those in charge of a railroad train to give the signals mentioned to apprise persons at or near a public crossing of its approach must be regarded as negligence. *Paducah, etc., R. Co. v. Hoehl*, 12 Bush, 41; *Louisville, etc., v. Goetz's Adm'x*, 79 Ky. 444, 42 Am. Rep. 227; and *Cahill v. Cincinnati, etc., R. Co.*, 92 Ky. 345, 18 S. W. 2. It has been held that the same reason does not exist for giving signals and slackening the usual speed of a train at private crossing, and failure in that respect is not generally regarded as negligence. *Johnson's Adm'r v. L. & N. R. Co.*, 91 Ky. 651, 25 S. W. 754, and the case in 92 Ky., 18 S. W., *supra*. In the *Cahill Case* the court used this language: "But the evidence in this case shows that a signal when given by steam whistle on approach of a railroad train from the south to the public crossing referred to can be distinctly heard at and even beyond Cahill's Crossing. And thus arises a question not heretofore presented to or decided by this court—whether persons lawfully using a private crossing in the vicinity of a public crossing are entitled to the benefit of signals required to be given at the latter; and whether, for the failure to give it, negligence, as to them, should in any case be imputed to the railroad company." The court decided that such failure was negligence as to persons using such private crossings. This principle is peculiarly applicable to the case at bar. The court in the *Cahill Case* also used this language: "On the contrary, it is bound to look out for presence of persons at an established and recognized private crossing, and use reasonable precaution and vigilance to avoid injuring them. And so they had the right to act upon the presumption the company will duly comply with every legal requirement that may affect them in the reasonable use of such crossing. Therefore, if a person of common prudence and intelligence, who distinctly and habitually hears signals of approach of railroad trains to a public crossing that he knows it is both the duty and the custom of the company to give, would ordinarily rely on such signals in the use of his own private crossing, then he should, in law, as well as in fact, have the benefit of them. Otherwise his would be the case of a person in-

Wilson's Adm'rs v. Chesapeake & O. Ry. Co

jured while in the reasonable exercise of a legal right, yet without remedy against the wrongdoer or person in fault." The court, continuing, said: "It is not contended the plaintiff was negligent in any respect, except failing to look for the coming train before going upon the railroad. Whether either she or Henry Conrad did so look could not, for the reason before indicated, be shown by direct testimony. Therefore it was the peculiar province of the jury, not of the court, to determine that question from facts and circumstances proved, for, whatever may be the rule elsewhere, it has been definitely settled by this court that it is not to be presumed, in the absence of evidence as to the care exercised by a person injured or killed on a railroad, where he had a right to be, that he recklessly or carelessly imperiled his own life. *Louisville, etc., R. Co. v. Goetz's Adm'rs*, 79 Ky. 442, 42 Am. Rep. 227. Moreover, even if plaintiff was guilty of negligence, considering the long distance—four hundred yards—the buggy could have been seen from the train, the question was pertinent, and ought to have been submitted to the jury, whether those in charge did or could by reasonable diligence have discovered the danger of a collision in time to prevent it by checking the train or blowing the whistle. But to decide that failure of a person to look along a railroad before attempting to cross it is under all circumstances and necessarily negligence would be arbitrary and without reason, for there may be evidence sufficient to satisfy a person of ordinary carefulness the track is clear, without taking that precaution, as when he knows it is not usual train time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, cannot, upon principle, be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time, at an extraordinary rate of speed, and without any signal of its approach." These principles are applicable to the case at bar, except it was not shown that the train was not behind time, or whether the deceased knew the time of the train. But if she did, the other facts proven would authorize a submission of the question of her negligence or want of care to the jury for its determination. In the 12 Bush case, *supra*, Mary Hoehl, the person injured, stated in her evidence that she did not look up or down the track for an approaching train before going upon the track. There was some evidence that those in charge of the train did not give any signals of the approach to the crossing, and the court determined in such case that it was a question of fact, to be tried by the jury, as to whether or not she was guilty of such negligence as to preclude a recovery on her part.

We are of the opinion that the lower court erred in giving the peremptory instruction. Wherefore the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

LOS ANGELES TRACTION CO. *v.* CONNEALLY *et al.*

(Circuit Court of Appeals, Ninth Circuit, February 6, 1905.)

[136 Fed. Rep. 104.]

Street Railroads—Injuries at Crossing—Contributory Negligence—Presumptions.*—In an action for death caused by a collision with a street car at a crossing, there was evidence that the horse deceased was driving approached the crossing at a gallop, whereupon the motorman immediately applied the brakes and did everything in his power to stop the car, and so far succeeded that deceased almost got across the track before the cart was struck. Immediately after the collision the horse appeared to be "sweaty," but stood quietly with two of his feet on the curbing of the sidewalk. The cart, when struck, was in a position indicating that deceased saw the car and took a diagonal course to cross ahead of it. Held, that such facts justified a finding that deceased was guilty of contributory negligence, so that it was error to charge that, in the absence of all evidence tending to show whether deceased stopped, looked, and listened before attempting to cross, it would be presumed that he did.

Same—Duty to Stop, Look and Listen.†—A person about to cross a street railroad track in an incorporated city is not bound, as a matter of law, to stop, look and listen.

In error to the Circuit Court of the United States for the Southern District of California.

Harris & Harris and *Byron L. Oliver*, for plaintiff in error.

Isidore B. Dockweiler and *Joseph Scott*, for defendants in error.

Before GILBERT, ROSS and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought for the recovery of damages for injuries resulting in the death of one Luke Conneally, father of the plaintiffs to the action, defendants in error here, and resulted in a verdict and judgment in their favor. The injuries were received in a collision of Conneally's cart with one of the electric cars of the plaintiff in error, at the intersection of Jefferson street and Vermont avenue, in the city of Los Angeles. In its answer the defendant to the action put in issue the averments of negligence on its part, and also pleaded contributory negligence on the part of the deceased. The questions presented on the present appeal grew out of the latter defense.

*As to the presumption of due care on the part of a person killed by a train or car, see foot-notes appended to *Brusseau v. New York, N. H. & H. R. Co.* (Mass.), 14 R. R. R. 157, 37 Am. & Eng. R. Cas., N. S., 157; foot-notes appended to *McDonald v. New York Cent. & H. R. R. Co.* (Mass.), 14 R. R. R. 125, 37 Am. & Eng. R. Cas., N. S., 125; *Kansas City-Leavenworth R. Co. v. Gallagher* (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750; *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294.

†See foot-notes appended to *Birmingham Ry., L. & P. Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Portsmouth St. R. Co. v. Peed's Adm'r* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65.

Los Angeles Traction Co. v. Conneally

The case is fairly stated by counsel, and is, in substance, as follows: Early in the evening of the accident, Conneally, who was a dairyman, and a strong, healthy man about 37 years of age, came into the city of Los Angeles to attend a meeting of the Milkmen's Association, and on his way to the meeting stopped at a saloon and took one drink of whisky; without apparent effect, however, for the evidence is undisputed that he was entirely sober at the meeting. After the meeting, and between 10:30 and 11 o'clock, he drank at least two glasses of beer; about 11:15 or 11:30 of the same evening he took within a few minutes of each other two drinks of whisky, and a few minutes later he drank at another saloon two small glasses of beer. During most of this time Conneally was accompanied by two other milkmen, named respectively E. Paggi and George W. Hood, both of whom were witnesses for the plaintiffs at the trial in the court below. These three persons lived near each other, and, after the drinking of the last two glasses of beer by Conneally, they started for their homes, Paggi and Hood in one conveyance, and Conneally in a heavy two-wheeled cart, drawn by one small, gentle horse. As they proceeded, Conneally was sometimes ahead, and at others Paggi and Hood were ahead, driving at the rate of about six miles an hour. There was no moon, and the night was dark and foggy, but it appears from the uncontradicted testimony that there was no difficulty in seeing from 30 to 40 yards. As the crossing of Jefferson street and Vermont avenue was approached, at which there was no street light, Paggi and Hood were in advance, and Conneally was following in his cart some 30 or 35 yards in the rear, which cart, according to the evidence, made a rattling noise. On Vermont avenue the defendant company had two tracks. The car that struck Conneally's cart and inflicted the injury which resulted in his death was going south on Vermont avenue, and was therefore on the west track. That street is straight for half a mile north from its crossing with Jefferson street, and its view unobstructed to one at the crossing. Of the men in the vehicle ahead of Conneally's, one testified that he saw no light on the car or from the car until after the accident; that he looked for a light, and saw none. The other said that "shortly after approaching Vermont, probably 30 or 40 feet from the line of the car track," he "glanced right and left, and saw no car." The motorman and conductor of the car that did the damage, and the motorman on a car approaching from the south, testified that the car was lighted; and the conductor further testified that at the time of the accident he was engaged in making up his trip sheet; and several witnesses testified that from the arrangement of the electric current, and from the fact that other cars on that circuit were lighted, the car in question must have had its lights burning. Paggi and Hood testified that they heard no gong or other warning from the car, while the motorman's testimony was to the effect that he sounded the gong all the way down Vermont avenue. The car seems to have

Los Angeles Traction Co. v. Conneally

been going, at the time of the accident, at the rate of about 10 miles an hour, whereas the speed prescribed by an ordinance of the city was not to exceed 8 miles an hour.

It appears from the diagram introduced in evidence that Jefferson street is 60 feet, and Vermont avenue 80 feet, in width. So far as appears, there was but one eyewitness of the accident, who was the motorman of the car that inflicted the injury. He testified, among other things, as follows:

"As we approached the place of the accident, the front end of the car was somewhere between the lines of Jefferson street. I think it was near the north line, and a single rig came out of the darkness and started across the tracks in front of me. The horse was on a gallop, and just the moment I saw him I applied the brakes and reversed my car, and did every thing in my power to stop, but I so slowed the car that he almost got across the track. If he had moved eighteen inches farther he would have cleared the track, but he didn't move that distance, so I struck the cart. To stop the car, I first applied the brake and threw my reverse. That is all that could be done to stop it. I made an extraordinary good stop. From the time I saw the cart, I should judge I stopped within a car length and a half—in the neighborhood of that. I believe a car is 39 feet in length. The moment I saw the cart I put on the brakes and tried to stop the car. After the accident occurred I got off the car and went back to the body. He [Conneally] was lying on his face, was turned over, and I examined him and felt his pulse, and he was still alive. I asked the conductor to go to Dr. Kissler's and call him. He lived only about half a block from where the accident happened. The conductor was at the body when I reached it; no one else. Mr. Hood and Mr. Paggi came afterwards. I am positive they did not come up until after. One of the first things I noticed was that Mr. Conneally had been drinking. I smelled liquor; it was real strong. The horse was standing with his front feet on the curbing, opposite the car. He was standing real still. He was tied afterwards."

The motorman's description of the position and condition of the horse was corroborated by the testimony of other witnesses, both for the plaintiffs and for the defendant, one of whom added that the horse was "sweaty."

After telling the jury that the burden of proof rested upon the plaintiffs as to all of the issues except that of contributory negligence, and that as to that the burden of proof rested upon the defendant, the court below instructed the jury as follows:

"Contributory negligence is such an act or omission on the part of the person injured, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act or acts of the defendant, was the proximate cause of the injury complained of by the plaintiffs, and whether or not said deceased exercised due care and caution before or in crossing or attempting to cross defendant's railway track is one of the issues

Los Angeles Traction Co. v. Conneally

submitted for your determination. The court, however, instructs you in this connection that it is the duty of an individual, before crossing or attempting to cross a railroad track, to exercise reasonable care in the use of his senses of sight and hearing, to ascertain whether or not a car or train is approaching, and, if he fails to exercise such reasonable care, he is guilty of negligence.

"The court further instructs you on this branch of the case that, in the absence of all evidence tending to show whether the deceased, Luke Conneally, stopped, looked, and listened before attempting to cross the west track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and, if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

The court also gave the jury these instructions:

"The jury are the sole judges of the facts and credibility of the witnesses, and in civil cases, such as the present one, should base their findings on a preponderance of evidence, uninfluenced by sympathy or prejudice for or against either party.

"The jury are not bound, however, to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a legal presumption or other evidence, satisfying their minds.

"If you believe from the evidence that said deceased was guilty of contributory negligence, your verdict will be for the defendant, even though there may have been negligence on the part of the defendant."

The instructions of the court concerning contributory negligence were duly excepted to by the plaintiff in error, and are here assigned as error. The portion most strenuously objected to is that relating to the presumption to be indulged by the jury that the deceased stopped, looked, and listened before attempting to cross the railroad track. That instruction is a copy of one approved by the Supreme Court in the case of *Baltimore & Potomac Railroad Company v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262, and was evidently taken from it. But that case presented a very different state of facts from the present one. In the first place, the instruction itself is to the effect that the presumption mentioned arises only "in the absence of all evidence tending to show" whether the deceased stopped, looked, and listened before attempting to cross the railroad track. Such instruction was applicable to the facts of the *Landrigan Case*, for,

Los Angeles Traction Co. v. Conneally

so far as appears from the report of the case, there was no evidence there tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the track. The present case is wholly different in that respect, for not only did the motorman (the only eyewitness to the accident, so far as appears) testify that the horse that the deceased was driving came out of the darkness on a gallop, upon the discovery of which he immediately applied the brakes, and did everything in his power to stop the car, and that he so slowed the car that the deceased almost got across the track before the cart in which he was riding was struck, but that testimony was somewhat, at least, corroborated by other uncontradicted testimony to the effect that the horse was "sweaty," indicating that he had been driven rapidly; that he was naturally so gentle as to stand, after such a crash, quietly with two of his feet on the curbing of the sidewalk; and that the cart when struck was from 30 to 50 feet south of the south line of the crossing, which would tend to show that the deceased saw the car and took a diagonal course to cross ahead of it. The jury might have found some corroboration of all this, too, in the uncontradicted testimony to the effect that, during the evening of the accident resulting in the death of the deceased, he took three drinks of whisky, and at least four glasses of beer, all of which beer, and two glasses of the whisky, were taken by him within about an hour and a half of the time of the accident.

The facts and circumstances here presented wholly differentiate the case, in our opinion, from that of *Baltimore & Potomac Railroad Company v. Landrigan*, supra, for it is very clear that in the present case there was evidence tending to show that the deceased, Conneally, did not stop before attempting to cross the track upon which he was injured. Where there is evidence upon the question of alleged contributory negligence, the case should be determined upon the evidence, and not upon a presumption that arises only in the absence of all evidence. *Philadelphia, etc., Railway Co. v. Stebbing*, 62 Md. 504; *Salvers v. Monroe*, 104 Iowa, 74, 73 N. W. 606; *Bell v. Clarion*, 113 Iowa, 126, 84 N. W. 962; *Smith v. Railway Co. (N. D.)* 53 N. W. 173; *Olmstead v. Railway Co. (Utah)* 76 Pac. 557; *Vorkman v. Railway Co. (Dak.)* 37 N. W. 731; *Huber v. Railway Co. (Dak.)* 43 N. W. 819; *Seaboard, etc., Co. v. Walthour (Ga.)* 43 S. E. 720. But for the instruction of the court to the effect that the deceased was presumed to have stopped, looked, and listened before crossing the track, the jury might, as said by counsel for the plaintiff in error, have found from the evidence that the car was lighted; that he put his horse into a gallop, and undertook to cross the track ahead of the car, thereby taking the risk of doing so.

There is also another marked distinction between the present case and that of *Baltimore & Potomac Railway Company v. Landrigan*. The latter was a case of a steam railroad, in which the duty usually devolves upon one crossing its tracks to stop, look,

Los Angeles Traction Co. v. Conneally

and listen before undertaking to do so. There could, of course, be no legal presumption that such an act was performed, unless the duty to perform it existed. We know of no decision, and have been cited to none, in which it has been held that it is always the duty of a person to stop before crossing a street railroad track in an incorporated city. Certainly, in the populous portion of a city or town such a rule would be unreasonable and highly inconvenient; but it may be that in the more sparsely settled portions a like rule to that applicable to steam roads should apply to street railroads.

In the case of *Tacoma Railway & Power Company v. Hayes*, 110 Fed. 496, 49 C. C. A. 115, this court, in the course of its opinion, said:

"The defendant maintains that the rule usually applied to the conduct of persons crossing the tracks of steam railroads is applicable to street railroads as well, and that the omission of the plaintiff to 'stop, look, and listen' before crossing the track was negligence as a matter of law. This rule, even in the case of steam railroads, is not inflexible, but is dependent upon the surrounding circumstances to a greater or less degree, and is only applicable to street railways where the attending conditions are such that reasonable care and prudence would dictate such precautions. The duties of persons with respect to steam railways and street railways are not so analogous as to be governed at all times by the same rule. *Railway Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915, 919. The rights of the person are greater, and the dangers less, in connection with the latter; the rights of street cars, no matter by what power impelled, not being superior to those of other vehicles, save in the one instance where a vehicle is bound to get out of the way, and not to obstruct the passage of the car, owing to the inability of the car to travel in any other part of the street. The element of trespass is entirely absent in the case of a person crossing a street railway at any point, and the only care required of him is that which a reasonably prudent man would exercise, having due regard to the rights of others, and assuming that others (including the street car companies) will exercise the same care; in fact, knowing that such care is imposed by municipal regulation upon the persons operating the street cars. This assumption does not, of course, warrant such a reliance upon it as to neglect means of self-preservation, but is an element of consideration in arriving at the standard of care to govern the particular case."

For the error above pointed out, the judgment must be, and is, reversed, and the cause remanded to the court below for a new trial.

MOREY v. LAKE SUPERIOR TERMINAL & TRANSFER RY. CO.

(Supreme Court of Wisconsin, May 2, 1905.)

[103 N. W. Rep. 271.]

Negligence—Pleading—Indefiniteness—Appeal.—A complaint indefinite as to whether ordinary negligence or willful injury was intended to be charged, having been treated by both parties as charging a cause of action for ordinary negligence, will be so treated on appeal.

Accident at Crossing—Proximate Cause—Absence of Signals and Unlawful Speed—Fright—Loss of Self Control.*—Where plaintiff, without negligence, approached to within 3 or 4 feet of defendant's railroad track at a crossing, looking in either direction for a train, when suddenly a train, which had given no warning signal, was seen 125 feet away, approaching at an unlawful speed, and, on account of its approach without warning and at such unlawful speed, he became shocked with fear, producing unconsciousness and loss of control over his actions, which caused him to fall towards and partly on the track, where the train struck him, defendant's negligence was the proximate cause of his injury.

Same—Contributory Negligence—Fright—Loss of Self Control.*—Before attempting to go over a railroad crossing at which there were several tracks, plaintiff, though his view of the track on which he was injured was shut off by obstructions, stopped and listened, and when 20 feet from such track, where he had a view of it for some distance, he looked along the track towards the west, and listened, but saw and heard no train, and then looked along the track towards the east, continuing to walk till within 3 or 4 feet of the track without seeing or hearing a train, when he stopped, and again looked to the west, where, 125 feet away, he saw a train approaching at an unlawful speed without any signal, on account of which he was shocked with fear, producing unconsciousness and loss of control over his actions, causing him to fall towards and partly on the track, where the train struck him. Held, that it could not be said, as a matter of law, that he was guilty of contributory negligence.

Appeal from Superior Court, Douglas County; C. Smith, Judge.

Action by Ray Rockwell Morey, a minor, by Willis C. Morey, his guardian ad litem, against the Lake Superior Terminal & Transfer Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action to recover damages for personal injuries. The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. It is alleged that the defendant is a corporation organized under the laws of this state, and operating a railroad in the city of Su-

*Loss of self control, caused by fright, whether contributory negligence, see foot-note appended to *St. Louis & S. F. R. Co. v. Brock* (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613.

As to what is, and is not the proximate cause of an injury, see foot-notes appended to *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, B. & N. O. R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

Morey v. Lake Superior Terminal & Transfer Ry. Co

perior; that plaintiff, a boy of the age of 12 years at the time of the accident, did then reside and now resides in the city of Superior; that defendant's railroad tracks run east and west within the city, between Eighth and Ninth streets, and across Cummings, Baxter, and Lamborn avenues, near to and directly south of the Chicago, St. Paul, Minneapolis & Omaha Railway Company's tracks. The complaint, in describing the tracks across the avenues in question, states that the most northerly track runs parallel to and near Eighth street, designated as Omaha track No. 1; about 20 feet south of and parallel to this track is Omaha track No. 2; about 7 feet south of this track is Omaha track No. 3; about 7 feet south of this track lies defendant's track, designated as Terminal track No. 1; and about 7 feet south of this is defendant's Terminal track No. 2. The avenues are alleged to be about 300 feet apart. Baxter avenue lies midway between Cummings avenue, on the west, and Lamborn avenue, on the east. The complaint states that a coal shed extending from Baxter to Lamborn avenue is located north of Omaha track No. 1; that between Omaha track No. 1 and Omaha track No. 2, and west of and abutting on Baxter avenue, there is a dwelling house; that between Omaha track No. 2 and Omaha track No. 3, between Baxter and Lamborn avenues, there is a lumber yard, with sheds; and that Omaha track No. 2 had freight or box cars upon it at the time of the accident, covering the whole track from Cummings avenue to Lamborn avenue, with an opening for the crossing on Baxter avenue. It is averred that as plaintiff, going toward the south to his home at the time in question, approached the crossing on Baxter avenue, the coal shed, dwelling house, lumber and sheds, and the box cars on Omaha track No. 2 completely shut off and obstructed his view of defendant's Terminal track No. 1 until he had passed the box cars on Omaha track No. 2. The complaint further states that at about the hour of 11 o'clock in the forenoon of September 14, 1901, plaintiff walked along Baxter avenue, reached this crossing from the north, and attempted to cross over the tracks; that when he approached the crossing he was unable to look east or west over defendant's Terminal track No. 1 on account of these obstructions, but that he listened for signals by whistle or ringing of bells, and for train noises, which he alleges could have been heard, if given or made; that he heard no noise or signals, and then proceeded south on the avenue to cross the tracks; that, when he emerged from between the box cars on Omaha track No. 2, he looked to the west along Omaha track No. 3 and defendant's Terminal track No. 1, and had a clear view of from one-half of a block to a block, and he saw no train or engine within this distance approaching over either track, and that he listened, and heard no train or bells or whistle; that he then turned to the east to look for approaching trains or engines in that direction, and proceeded on his walk southward until he reached a point about midway between Omaha track No. 3 and

Morey v. Lake Superior Terminal & Transfer Ry. Co

defendant's Terminal track No. 1, this occupying only a few seconds in time; that he heard no noise or signal of an approaching train from either direction; that he then and there stopped, and again turned to look to the west, when about 125 feet west he suddenly saw a train coming toward him on defendant's Terminal track No. 1 at the high and unlawful speed of about 20 miles per hour, without having given any signal by ringing the bell or blowing the whistle; that, on account of not having been warned of its sudden approach at such a frightful and dangerous rate of speed, he became shocked with fear, producing unconsciousness and loss of control over his actions, which caused him to fall to the ground toward the track; and that as he fell his left leg and foot were placed across the north rail of defendant's track, were struck by the train, and so injured as to necessitate an amputation. The court sustained the demurrer to the complaint. This is an appeal from the order.

Samuel A. Anderson and Crownhart & Foley, for appellant.
J. A. Murphy and Heber McHugh, for respondent.

SIEBECKER, J. (after stating the facts). It is strenuously urged by defendant that this action cannot be maintained because the cause of action pleaded is covered and concluded by a judgment of this court on an appeal in a former action, and that therefore the rule of *res adjudicata* applies to all questions involved in this case. This action is wholly independent of, and in no way connected with, the other and former action referred to. Nothing in the case shows that it is the same cause of action as is embraced in the judgment so relied on. It appears that this is an original action, which has not been before this court, and that it has never been prosecuted to judgment in the trial court or in this court. On this appeal we are confined to the record and proceedings in this case, and therefore no question of *res adjudicata* is involved.

In stating the facts the pleader employed language which somewhat confuses the purpose of the complaint. The terms employed charge the defendant with ordinary negligence in the management and conduct of its business in running the train in question, and then characterizes the conduct of the persons in charge of the engine as "reckless, wanton, and unlawful," without clearly indicating whether or not it is intended to charge an intentional wrong. This form of pleading has been the subject of discussion in the recent cases of *Wilson v. Chippewa Valley Electric Ry. Co.* (Wis.) 98 N. W. 536, 66 L. R. A. 912, *Turtenwald v. Wisconsin Lakes Ice & Cartage Co.*, 121 Wis. 65, 98 N. W. 948, and *Rideout v. Winnebago Traction Co.* (Wis.) 101 N. W. 672, and been held to be improper and open to a motion for indefiniteness. It seems that it was intended to state but one cause of action, and, in determining the question raised by the demurrer, it is therefore necessary to declare what cause of action is pleaded. Counsel for both parties have assumed that the

Morey v. Lake Superior Terminal & Transfer Ry. Co

complaint charges a cause of action for ordinary negligence. This construction, under the above cases, precludes all claim that it states a cause of action for a willful injury, and we shall so treat it.

It is contended that, under the facts stated in the complaint, it appears, as a matter of law, that the negligence charged was not the proximate cause of the injury. The specific grounds of negligence charged are that defendant negligently ran its train over the crossing at an illegal rate of speed, that it negligently omitted to give the required signals by ringing the bell or blowing the whistle to give warning to persons near or upon the crossing, and that, in running its train across the street in question, it negligently failed to keep a lookout for the purpose of avoiding collision with persons or vehicles using the same. Liability is asserted under these facts upon the ground that such acts of negligence caused the plaintiff to become unconscious and helpless from fright at the unexpected and sudden danger, and that such negligence, through this unconsciousness and helplessness, produced the injuries complained of. Since it must be held that the complaint alleges a cause of action for ordinary negligence only, we cannot perceive how, in any aspect of the situation, the alleged failure to keep a proper lookout could be found to be the proximate cause of the injury, in view of the claim that plaintiff's helpless condition and consequent injury were caused by the unlawful speed of the train, and the failure to give him any warning of its sudden approach. The allegations of negligence upon this subject are not essential to the cause of action alleged, and upon which plaintiff relies. The failure to give signals at the crossing of the approach of the train, and the running of the train at an unlawful rate of speed within the city, are recognized by the decisions of this court as negligent management of defendant's business. See *Brown v. C. & N. W. R. Co.*, 109 Wis. 384, 85 N. W. 271; *Williams v. C., M. & St. P. Ry. Co.*, 64 Wis. 1, 24 N. W. 422; *Hoye v. C. & N. W. R. Co.*, 62 Wis. 666, 23 N. W. 14; *Eilert v. G. B. & M. R. R. Co.*, 48 Wis. 606, 4 N. W. 769; *Bower v. C. M. & St. P. Ry. Co.*, 61 Wis. 457, 21 N. W. 536. The question is, do these alleged wrongful acts constitute actionable negligence? The defendant's demurrer challenges such a claim, and avers that such negligence was not the proximate cause of the injury, for the reason that a person of ordinary intelligence and prudence could not reasonably be held to foresee that a personal injury to another might probably follow from such alleged negligent conduct. A discussion of what constitutes proximate cause in negligence cases has been fully covered by former decisions of this court. See *Kellogg v. C. & N. W. Ry. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; *Deisenrieter v. The Kraus-Merkel Malting Co.*, 97 Wis. 279, 72 N. W. 735; *Meyer v. Milwaukee Electric Railway & Light Co.*, 116 Wis. 336, 93 N. W. 6; *Fehrman v. Town of Pine River*, 118

Morey v. Lake Superior Terminal & Transfer Ry. Co

Wis. 150, 95 N. W. 105. These cases are to the effect that "the efficient cause [is] that which acts first, and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause, as a person of ordinary intelligence and prudence, ought reasonably to foresee that a personal injury to another may probably follow from such person's conduct." *Deisenrieter v. Kraus-Merkel Malting Co.*, *supra*. Such responsible causation is not dependent on time, distance, or a mere succession of events. It is the cause that acts first, and, either immediately or through other intervening agencies put in operation by it, produces the final result. From this it follows that, if any event is produced by independent intervening circumstances, not put in operation by the wrongful acts alleged as the cause of an injury, no legal responsibility attaches, for the reason that "whenever a new cause—circumstance—intervenes which is not a consequence of the first wrongful cause, and which is not under the control of the wrongdoer, and which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action." *Atchison, Topeka & Santa Fee R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Schumaker v. St. P. & D. R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257. Upon this question defendant's argument in the instant case is that, in the light of the attending circumstances, the sudden fright of plaintiff, and his consequent helpless condition, if produced by the unlawful and reckless approach of the train, was a consequence which could not reasonably have been foreseen and anticipated by a person of ordinary intelligence and prudence, and that it must follow, as a matter of law, that no actionable negligence is charged. We cannot so regard the situation presented by the facts alleged in the complaint. The complaint avers that plaintiff was lawfully traveling over the crossing; that he exercised the precaution of looking and listening for approaching trains before attempting to pass over the first track; that he so looked and listened while crossing over the second track through an opening between freight cars which obstructed his view of the crossing; that as he emerged from between the cars, and was at a point about 14 feet from the track where the train struck him, he looked to the west for a distance of from one-half of a block to a block, and saw no moving train, and heard no noise or signal or warning by whistle or bell of an approaching train; that he turned and looked to the east to see if any train or engine was approaching, and, while making this observation, proceeded on his course to a point between 3 or 4 feet from defendant's track, when he again turned, and looked to the west, and saw a train, distant about 125 feet, coming toward him at a high and dangerous rate of speed; and that such fast and perilous running of the train, and its sudden approach without warning,

Morey v. Lake Superior Terminal & Transfer Ry. Co

so frightened him as to produce unconsciousness and consequent helplessness. Are these alleged consequences of the wrongful conduct of defendant clearly of such an extraordinary character that it must be said, as a matter of law, that they could not reasonably have been foreseen and anticipated by a person of ordinary intelligence and prudence, in the light of the attending circumstances? This must be answered in view of the common knowledge on the subject acquired from experience in life under like and similar circumstances. We are persuaded that they are not of such an extraordinary and unusual character that they should be held as not within the range of probabilities in the affairs of life, and that the facts stated in the complaint are sufficient to constitute actionable negligence.

The suggestion that it is beyond reasonable probability that the specific injury might have been anticipated does not meet the question. It is not required that the "specific" injury or "such" an injury as is complained of was or ought to have been specifically anticipated as the natural and probable consequences of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them. *Mauch v. City of Hartford*, 112 Wis. 40, 87 N. W. 816; *Meyer v. Milwaukee Electric Railway & Light Co.*, supra; *Deisenrieter v. Kraus-Merkel Malting Co.*, supra, and cases cited in opinion; *Atchison, Topeka & Santa Fee R. Co. v. Stanford*, supra; *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567; *Motey v. Pickle Marble & Granite Co.*, 74 Fed. 155, 20 C. C. A. 366.

The question whether plaintiff was guilty of a want of ordinary care, under the facts and circumstances alleged, which contributed to produce the injury complained of, is one for the jury. The allegation that plaintiff stopped to look and listen before attempting to cross the tracks, and again while in the act of crossing over the tracks, and that he saw no train approaching when he last looked, and heard no noise or signal of an approaching train or engine until he suddenly saw the train approach under the circumstances alleged, which caused him to fall and become helpless through defendant's wrongful conduct, presents a situation of which we cannot say, as matter of law, that his conduct is so variant from that of ordinarily prudent persons as to constitute negligence per se. *Bohn v. City of Racine*, 119 Wis. 341, 96 N. W. 813.

The order appealed from is reversed, and the cause remanded, with directions to enter an order overruling the demurrer, and for other proceedings according to law.

MCLEAN *v.* OMAHA & C. B. RY. & BRIDGE CO.

(Supreme Court of Nebraska, April 19, 1905.)

[103 N. W. Rep. 285.]

Directing Verdict.—On a motion to direct a verdict for the defendant the plaintiff is entitled to every inference which the jury would have been warranted in drawing from the evidence adduced.

Contributory Negligence—Question for Jury.—In an action for personal injuries, where contributory negligence is relied upon as a defense, and where, from the facts and circumstances proven, reasonable minds may draw different conclusions concerning the negligence of the plaintiff's intestate, such question should be submitted to the jury.

"Last Clear Chance" Doctrine—Application—Sufficiency of Evidence.*—Evidence examined, and held not sufficient to bring the case within the reason of the "humane doctrine" or "last chance."

(Syllabus by the Court.)

OLDHAM, C. The former opinion in this case is officially reported in 67 Neb. —, 100 N. W. 935. A rehearing was granted for the further consideration of the question as to whether, under all the facts and circumstances surrounding the injury, as shown by the evidence offered by plaintiff in the trial of the cause in the district court, the trial court was justified in directing a verdict for defendant on the doctrine of contributory negligence, and also for the purpose of further examining plaintiff's contention that the facts and circumstances surrounding the injury as shown by plaintiff's evidence brings the case within the reason of the "humane doctrine" or "last chance." We agree with plaintiff's contention that on a motion to direct a verdict for the defendant the plaintiff is entitled to every inference which the jury would have been warranted in drawing from the evidence adduced. Now, it is clearly proven that at the point where the injury occurred there were two lines of defendant's street railway track, running east and west, and that there was a space of a few feet between and separating them. It was also proven that the north line of track was used by the cars going west, and that the south line of track was used by the cars going east. It was also shown by the testimony that the deceased was familiar with the running of these cars, as he had resided for a long time in Council Bluffs, and passed over these car lines in going to and from his place of business in Omaha two or three times a day. The trial judge concluded from this testimony that deceased was clearly negligent in walking westward on the north track without looking behind him for an approaching car, because he must have known

*For authorities in this series for, or against, the "last clear chance" doctrine, see foot-note appended to *Carter v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas., N. S., 324; *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643.

McLean v. Omaha & C. B. Ry. & B. Co

that the west-bound cars used this track. This is, perhaps, a legitimate conclusion under the facts and circumstances proven. It is also in evidence that the accident occurred after midnight, and was caused by the car making the last run for that night, which was then from 8 to 10 minutes behind time. Now, it is urged by counsel for plaintiff that if it was proper, from the evidence introduced, to impute to the deceased knowledge of the track on which the west-bound car was accustomed to run, it was also competent to impute to him knowledge of the fact that the last car going west that night would, if on time, have passed the place where the injury occurred 5 or 10 minutes before the injury, and that this fact, if believed by the jury, might excuse him from the imputation of contributory negligence in not looking behind him for an approaching car coming from the west. If this directed verdict stood only on the doctrine of contributory negligence imputed to deceased for walking westward on defendant's north track at the time the injury occurred without looking behind him for an approaching car, I would incline to the opinion that such question was one of fact for the jury, rather than one of law for the court. Contributory negligence is an affirmative defense in actions for personal injuries of this nature, and, where reasonable minds may draw different conclusions from the conduct on which negligence is predicated, such question is for the determination of the jury, and not of the court. We have carefully re-examined the evidence contained in the record to see whether or not it tends to show any fact or circumstance that would bring the case within the reason of the "last chance" doctrine. This doctrine, as applied to this case, is based on the duty which the defendant would owe on discovering the deceased in a perilous position, from which he apparently could not and would not escape, to use every reasonable means at the command of the servants in charge of its cars to stop the car for the purpose of avoiding the accident. The doctrine has found favor in this court, and was recently applied in the case of Omaha Street Railway Co. v. Larson (Neb.) 97 N. W. 824. We do not understand that it is the duty of the operators of a street railway car to stop the car as soon as they see a foot passenger occupying the track in front. We think that ordinarily the motorman may proceed toward such foot passenger on the presumption that such passenger will step off the track before the car reaches him, until it becomes apparent that for some reason such passenger, either on account of deficient hearing or other inability to apprehend his danger cannot, and probably will not be able to, get off the track; and that then it becomes his duty to use all reasonable means at his command to stop the car. Now, the evidence in the case at bar wholly fails to show that the motorman, after discovering the perilous position of the deceased, could, by the use of all means at his command, have stopped the car, and thereby avoided the accident. Consequently we do not think that the evidence in the record brings this case

Christensen v. Oregon Short Line R. Co

within the reason of the "humane doctrine," nor do we find any competent evidence in the record to show actionable negligence on the part of the defendant which was the proximate cause of the injury. From a re-examination of the record the accident appears to us to fall in that class of casualties frequently met in life in which there is a serious injury sustained for which no one is legally to blame.

AMES and LETTON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the former opinion is adhered to.

CHRISTENSEN v. OREGON SHORT LINE R. Co.

(Supreme Court of Utah, April 14, 1905.)

[80 Pac. Rep. 746.]

Accident at Crossing—Contributory Negligence—Proximate Cause.—In an action against a railroad for the death of plaintiff's son, killed in a crossing accident, held, that the questions of negligence, contributory negligence, and proximate cause were for the jury.

Children—Care Required of.*—A child is only required to exercise that degree of care and discretion that is reasonably expected from children of his own age.

Accident at Crossing—Negligence—Signals—Evidence.—In an action against a railroad for the death of plaintiff's son, who was killed by being run over at a crossing while driving cows along a highway, plaintiff claiming that no signals of the the approach of the train were given, it was proper to admit evidence as to how many persons were in the habit of sending their cattle over the highway, to show for what purpose and to what extent the highway was used at the time of and prior to the accident.

Same—Same—Gates—Flagman.—Failure of a railroad company to keep a flagman or to maintain gates at a highway crossing in the country was not negligence.

Same—Same—Same—Same—Evidence.—In an action for the death of plaintiff's son, who was killed at a crossing, though the complaint did not charge negligence in failing to keep a flagman at the crossing, or in failing to maintain gates there, it appearing that the crossing was almost continuously used by the public, and there being evidence, as alleged in the complaint, that the train in question ran at an excessive speed and without giving signals of its approach, it was proper to admit evidence as to the absence of gates or a flagman; the jury being instructed that the evidence was admitted merely as bearing on the negligence charged in the complaint.

Bartch, C. J., dissenting.

Appeal from District Court, First District; Charles H. Hart, Judge.

*See foot-note appended to *Dubiver v. City & Suburban Ry. Co.* (Ore.), 13 R. R. R. 451, 36 Am. & Eng. R. Cas., N. S., 451; foot-note appended to *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107; *St. Louis, etc., Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807; *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307.

Christensen v. Oregon Short Line R. Co

Action by Lars Peter Christensen against the Oregon Short Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action by plaintiff to recover damages against defendant for the death of his son, a boy between eight and nine years of age, alleged to have been occasioned by the negligence of the defendant, on the 26th day of September, 1903, at a public crossing which is about 2,100 feet north of defendant's station house at Brigham City, Box Elder county, Utah. The particular acts of negligence, alleged in the complaint are that, while plaintiff's son was driving some cows eastward along the wagon road from a pasture west of the railroad, the defendant carelessly and negligently ran and operated one of its locomotives and trains so as to cause it to approach said crossing at a dangerous, unreasonable, and unlawful rate of speed, and negligently failed to give any warning of the approach of said train by ringing the locomotive bell or sounding its whistle, as a result of which plaintiff's son, Alma Christensen, being unaware of the approach of the train, was struck and killed at the crossing mentioned. The answer of defendant denied these allegations, and affirmatively charged contributory negligence of the plaintiff and of said Alma Christensen. The facts, as they appear in the record, are about as follows: The plaintiff's son, Alma Christensen, was at the time of the accident engaged in driving three or four cows east along a country road from his father's pasture, which was 80 rods west and 30 rods north of the crossing. The road upon which the boy was traveling runs at right angles with and crosses four tracks, the main one being the third track from the west. Within 80 rods east of the crossing there are eight houses occupied by families; also a packing house at which there were from 50 to 300 cases of fruit packed daily. West of the railroad are from 10 to 13 cow pastures, in which the inhabitants living on the east side pastured their cattle. Besides they have orchards and farming land there, and the only access to these pastures, orchards, and farming land is over this crossing. From 7 to 9 o'clock every morning cattle would be driven to these various pastures in herds, from 3 to 12 each—a total of from 60 to 100—by small boys and girls, of ages ranging from 6 to 15 years, among whom was plaintiff's son, Alma. There were from one to four of these children with each herd. The children would return home, and in the afternoon, from 4 to 7 o'clock, would go and get their herds and drive them back again over the same crossing. Besides the boys and girls who used this crossing, there were about 50 other persons who used it daily. In addition to the pedestrians who used the crossing, there were between 40 and 50 teams which passed over it each day, some of which would cross as often as 10 times per day. One witness testified, and his testimony is uncontradicted, that "There is a constant string of wagons over that crossing, going over there all the time down to the orchards west of the track. There are about 14 places that

Christensen v. Oregon Short Line R. Co

this lane [where the boy was killed] leads to. In the fruit season down there it is a perfect bed of industry. Whole lot of people down there." The highway on which the accident occurred enters Brigham City from the northwest, and is the first lane or highway of the kind north of the depot, and has been open and in use for 40 years. The exact distance from the point where the boy was killed into the inhabited portion of the city is not given, but it appears from the record that it is not very far. The foregoing facts, in a general way, explain the condition at and in the vicinity of the crossing on and for a long time prior to September 26, 1903, when, at about 5:30 p. m. on a clear day, and upon a straight track, one of defendant's engines, attached to a special train carrying the officers of the road, was run by an engineer, who, the record shows, had been running over the crossing referred to for about 29 years. The speed at which the train was going at the time of the accident is variously estimated from 40 to 60 miles per hour, but the great preponderance of the evidence is to the effect that the rate of speed was greatly in excess—in fact, nearly twice that—of the regular passenger trains which passed over this crossing. In fact, the testimony of the defendant's witnesses shows that the speed of the train was from 15 to 25 miles per hour greater than that of the regular passenger trains. The boy was returning home with his herd of four cows, which he was driving eastward over the highway and crossing; and there is evidence in the record which tends to show that he either heard or saw the approaching train before he reached the crossing. At what distance is a matter of conjecture, there being a sharp conflict in the evidence as to whether or not on this occasion the usual and customary signals were given as the train approached the crossing. The boy checked his movements and stopped driving the cows, and was holding them at a point about 50 or 60 feet west of the main line, and about 30 feet west of the west track, and appeared to be waiting for the train to pass. Before the train arrived at the crossing, one of the cows ran forward towards the track. The boy followed for the purpose, evidently, of keeping her off the track, and out of the way of the coming train, and, in doing so ran between the cow and the engine. He did not get on the track or in front of the engine, but got so close to it that he was struck on the left side and on the head by the engine and killed. It is conceded, and the record shows, that he was a bright, trustworthy, and intelligent boy, for his age. At the conclusion of plaintiff's testimony, and after the jury had visited the scene of the accident and made a personal inspection of the premises, the defendant moved the court for a judgment of nonsuit, first, on the ground that plaintiff had failed to prove that any alleged act of negligence of the defendant was the cause of the accident; and, second, that plaintiff, the father of the boy, was guilty of contributory negligence in sending his son, a boy of immature years, to drive stock along a lane across which ran the railroad track in question. The motion was over-

Christensen v. Oregon Short Line R. Co

ruled, and after the defendant had put in its defense the cause was submitted to a jury, which returned a verdict in favor of the plaintiff, and assessed his damages at \$2,500. From the judgment entered on the verdict, defendant has appealed to this court.

P. L. Williams and *Geo. H. Smith*, for appellant.

C. C. Richards and *J. D. Call*, for respondent.

MCCARTY, J., after stating the facts, delivered the opinion of the court.

Defendant requested the court to peremptorily instruct the jury to return a verdict in its favor—no cause of action—which the court refused to do. We think the court was right in refusing this instruction. Nor do we think the court erred in overruling defendant's motion for a nonsuit.

The undisputed evidence in the case shows that the highway and crossing in question are, and for many years have been, used by the people (men, women, and children) who live in that vicinity for the purpose of going to and returning from their farms, and also to drive their cows to and from the pastures. During the season of the year in which the accident occurred the lane and crossing are almost constantly used and traveled by the people of that immediate vicinity. Under these circumstances, the defendant company was chargeable with notice of the use that was being made of the crossing, and was legally bound to use reasonable and ordinary care in the management of its trains when approaching and passing over the crossing to prevent injury to those who at the same time may happen to be traveling along the highway, and in the act of crossing the company's tracks. In the case of *Young v. Clark et al.*, 16 Utah, 42, 50 Pac. 832, this court held that: "Where the public in considerable numbers have been accustomed for a length of time to use a bridge or railroad track as a footpath in populous cities or thickly settled communities, without molestation or objection from the company, and by reason of such general custom the presence of people upon such track or bridge is probable or might reasonably be anticipated, those in control of passing trains are bound to use reasonable diligence and precaution to prevent injury to those who might be thereon."

The great preponderance of the evidence shows that the train on this occasion, just prior to and at the time of the accident, was being run at an unusual and high rate of speed—much greater than that of the regular passenger trains when they passed over this part of the company's track. The engineer testified that when he saw the cow go upon the track he shut off the steam, applied the air brakes, and used every appliance at his command to stop the train, but did not succeed until it had gone from 900 to 1,000 feet. W. O. Knudson, a witness for the plaintiff, testified that he saw the engine strike the cow, and "when struck she went into the air to about the top of the smokestack,

Christensen v. Oregon Short Line R. Co

and landed down the track 53 steps"; that he thought the train was going 50 miles an hour at a point 160 feet south of the crossing, and after striking the boy it went down to the creamery, a distance of probably 2,000 feet. Witness W. L. Wright testified in part as follows: "I saw the cow go into the air. * * * The cow was thrown into the air as high as the smokestack. After striking the cow, the train ran up to the creamery, a little over a quarter of a mile." David Beuchanan, another witness, testified in part as follows: "I saw the collision. The cow was knocked as high in the air as the top of the smokestack. * * * When the train struck, it was running at the rate of 60 miles an hour." Under these circumstances, the question of negligence on the part of the defendant, and that of contributory negligence on the part of the plaintiff and the boy who was killed, were questions of fact for the jury to determine.

It is urged by the appellant that the proximate cause of the accident was the act of Alma Christensen, plaintiff's son, in going so dangerously near the track as to come in contact with the engine, which, it is claimed, is sufficient of itself to preclude recovery. Whether the rate of speed here was negligence, and, if so, whether such, or the failure to give signals, or both, or some act of the child, was the proximate cause of the collision and injury, were questions of fact for the jury. *Ill. Cent. R. Co. v. Benton*, 69 Ill. 174; *Southern v. N. Y. C. & H. R. Co.* (Sup.) 23 N. Y. Supp. 478; *C. A. R. Co. v. McDaniels*, 63 Ill. 122. The boy was rightfully on the highway with his cows, and when his attention was attracted to the approaching train he at once stopped his cows, and placed himself between them and the crossing, presumably for the purpose of holding them there until the train passed by. Before the train arrived at the crossing, one of the cows broke away from him and started in the direction of the railway crossing; and the boy, acting under a natural as well as a manly impulse, not a reckless or wrongful one, started in pursuit of the animal. Up to this time he had exercised the same degree of care and caution as would be expected and required of a grown person acting under the same or similar circumstances. In following the cow the boy did not go upon the track, but kept to the west of it. He was intent upon saving the cow, and his back was toward the approaching train when he was struck. In order to hold that this last circumstance or act of the boy was the proximate cause of the accident, and that the defendant is thereby relieved from liability for its own acts, which the jury must have found were negligent, we must hold, as a matter of law, that the boy was negligent and failed to exercise that due care for his own safety while in pursuit of his cow that would reasonably be expected of a boy of his age, and with his intelligence, understanding, and experience, which the record shows was equal to, if not superior to, that of the average boy of his years. For it is well settled that a child is only required to exercise that degree of care and discretion as is reasonably

Christensen v. Oregon Short Line R. Co

expected from children of his own age. 1 Shear. & Redf. Negligence, p. 106; Riley v. Rapid Transit Co., 10 Utah, 428, 37 Pac. 681. Even though we should apply the same legal test to the actions of the boy on that occasion as would ordinarily be applied, under like circumstances and conditions, to people of mature years, we are not prepared to say, as a matter of law, he was guilty of contributory negligence. "One who, seeing his property imperiled, hastens to protect it, and in so doing imperils his own person, is not necessarily deprived of remedy thereby. It is his right and duty to protect his property so long as he can do so without recklessly exposing himself to injury." 1 Shear. & Redf. Neg. p. 123; Rexter v. Starin, 73 N. Y. 601; Wasmer v. Delaware R. Co., 80 N. Y. 212, 36 Am. Rep. 608; North Pa. R. Co. v. Kirk, 90 Pa. 15. As to whether the boy used that same degree of caution and prudence for his own safety as would be expected of children of his age, experience, and intelligence, under the same or similar conditions, was, under the circumstances of this case, a question for the jury to determine. And even if it be assumed that he saw or heard the approaching train before he started after the cow, yet there is no evidence to show that he knew of the rate of speed the train was being run at the time, or as to its close proximity to the crossing. It is conceded that when he was struck by the engine he was at one side of the track. And for aught that appears from the record, he may have been in the act of getting away from the train and out of danger, but, on account of the high rate of speed it was being run, was unable to do so.

During the progress of the trial the following questions were asked of the plaintiff, which the court permitted him to answer: "Do you know, Mr. Christensen, whether others were in the habit of sending their cattle down over that same road to pasture at that time?" "How many different parties were sending their cattle down there at that time when you were sending yours down?" To these questions, and others of like character, defendant objected on the ground that they were irrelevant and immaterial. The ruling of the court in admitting this testimony is now assigned as error. This was proper evidence, as it tended to show for what purpose and to what extent the highway was used at the time of and prior to the accident.

Evidence was also introduced which showed that there were no gates at this crossing, and that no flag or flagman was kept there to warn people who used the highway of the approach of trains. To this evidence defendant objected on the same grounds stated in the objections interposed to the questions just referred to, and for the reason that there was no allegation in the complaint charging negligence because of the defendant's failure to keep flagmen stationed at the crossing. While the defendant's failure to keep a flagman and to maintain gates at the crossing was not negligence, yet it was not error for the court to admit evidence showing that there were neither flagmen

Christensen v. Oregon Short Line R. Co

nor gates there, as such evidence, in connection with proof of the conditions respecting the number of people who used this highway, whether adults or children, the purpose for which it was used, its locality with reference to a populous community, or otherwise, would have a bearing on the question as to whether or not the defendant was negligent in running its train at the unusual and high rate of speed which the weight of the evidence tends to show it was run on that occasion. This testimony was not admitted to prove negligence on the part of the defendant in not having gates or a flagman at the crossing. The fact of the presence or absence of a gate or flagman may be proven as a circumstance among others surrounding the crossing, and by which the degree of care requisite in the handling and running of the train may be affected, and whether, in view of the presence or absence of a flagman or gate, among all other circumstances, the train was moved and ran with prudence or negligence. For it may well be considered by the jury that, at a crossing so greatly and almost continuously used by the public as was here shown by the evidence, a greater amount of vigilance and care was to be observed by the servants in charge of the train in respect to signals, rate of speed, and handling of the train, in the absence of gates and a flagman, than would be required with the presence of gates and a flagman. In other words, a certain speed might not be considered by the jury as negligence at a crossing with the presence of gates and a flagman to warn the traveling public, while that same speed might be considered negligence at the crossing when there were no gates or a flagman. For this purpose the evidence was admitted, and for such purpose was competent. *Chicago R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *McGrath v. R. Co.*, 63 N. Y. 522; *Reed v. R. Co.* (Sup.) 87 N. Y. Supp. 810; *Abbott et al. v. Dwinnell*, 74 Wis. 514, 43 N. W. 496; *Heddles v. R. Co.*, 74 Wis. 239, 42 N. W. 237; *Hoye v. R. Co.*, 67 Wis. 1, 29 N. W. 646; *Houghkirk v. D. & H. Canal Co.*, 92 N. Y. 227, 44 Am. Rep. 370.

The trial court in this case, at the time the evidence complained of was admitted, restricted it to the acts of negligence alleged in the complaint. The court said: "The danger of admitting the testimony is, it might be taken by the jury as evidence of some act of negligence that is not within the issues of this case; that there may have been negligence upon the part of the company in not maintaining gates or watchmen there as independent matter, apart from the negligence that is alleged in the complaint. Limiting and restricting the testimony to a consideration of whether the acts of negligence as charged in the complaint existed or not, the testimony, I think, is admissible; but the jury should observe the distinction, and not consider it as proof of some independent act of negligence that is not charged here. With that limitation and restriction, I think the testimony may be admitted. As before explained, it is only admitted for the bearing it may have, if any, upon the acts of negligence alleged."

Bugbee v. Union R. Co

The court also gave the jury the following instruction: "Before the plaintiff is entitled to recover in this action, he must show by a fair preponderance of the evidence negligence on the part of the railroad company in the particulars alleged in the complaint, and he must further show by the same amount of evidence—that is, by a fair preponderance—that the negligence alleged in the complaint was the proximate cause of the injury complained of." The court having thus carefully admonished the jury at the time the evidence was admitted, and later on, in its general instructions, limited the testimony and plaintiff's right to recover to the acts of negligence alleged in the complaint. we do not think the jury could have been misled, or the rights of the defendant in any way prejudiced, by the admission of the testimony respecting the absence of flagmen and gates at the crossing.

The judgment of the district court is affirmed, with costs.

STRAUP, J., concurs.

BUGBEE v. UNION R. CO.

(Supreme Court of Rhode Island, April 8, 1904.)

[59 Atl. Rep. 165.]

Accident on Street Car Track—Negligence—Sufficiency of Evidence.—Evidence in an action for the death of a traveler in a collision with a street car held not to support a finding of actionable negligence on the part of the street railway company.

Same — Proximate Cause — Contributory Negligence—Intoxication.*—Evidence in an action for the death of a traveler in a collision with a street car held to show that the proximate cause of the accident was the negligence of the decedent, precluding a recovery.

Action by Geo. W. Bugbee, administrator, against the Union Railroad Company. There was a verdict for plaintiff, and defendant petitions for a new trial. Petition granted.

E. D. Bassett, for plaintiff.

Hayes, Easton & Hoffman, for defendant.

PER CURIAM. The great preponderance of evidence, as well as very strong probability, are against the plaintiff's claim that the car was not lighted at the time of collision with the intestate. All the witnesses who were upon the car, five passengers, besides the motorman and conductor, testify that up to that time the lights were burning, and that at the shock of striking the man they went out. The inspector who examined the car soon after the accident found the front lamp broken, which reasonably accounts for the other lamps in the series going out simultaneously. It cannot be that the officers and passengers on the

*As to the effect of the intoxication of a person injured on the right of recovery, see foot-notes appended to *Vizacchero v. Rhode Island Co. (R. I.)*, 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172.

Titus v. Chicago, etc., Ry. Co

car did not know when the lights of the car were lighted and when they were extinguished, but the witness who was riding upon the following car may well have been mistaken as to the point where his car came in sight of the one ahead of it. According to the evidence of the conductor of the second car, it did not come in sight of the first until the accident had taken place, and then all agree the lights were out. The evidence is not sufficient to support the finding of negligence on the part of the defendant. Moreover, the eyewitnesses of the accident say that the intestate was staggering towards the car when he was struck. Other witnesses saw him during the afternoon and evening in various stages of intoxication. That he was walking along the railroad track while intoxicated seems to be well established. It is not contended that after he was seen the car could have been stopped in time to avoid him. The proximate cause of the accident was evidently his carelessness in walking on the track while his senses were affected by liquor.

Petition for new trial granted.

TITUS v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa, May 2, 1905.)

[103 N. W. Rep. 343.]

Injury to Horse—Open Gate—Question for Jury.—In action against a railroad for the killing of a horse, which went through a gate in defendant's right of way, evidence held to warrant submitting to the jury the question as to how the gate became open.

Same—Sufficiency of Gate.—Whether the gate was sufficient in construction and fastening was also a question for the jury.

Same—Same—Evidence—Subsequent Precautions.*—Where it was shown that the gate, if opened by stock at all, was opened by the use of the upper board for rubbing purposes, so that the question of the space between the upper and the second board became material in determining whether the gate was improperly constructed, the admission of evidence that after the accident the defendant had fastened a wire between the two boards was reversible error.

Failure to Fence—Double Damages—Statute—Construction.—Code § 2055, provides for double damages against railroads for injury to stock caused by failure to fence the right of way. Section 2057 defines a legal right of way fence, and section 2058 provides a penalty for failure to fence as provided in the preceding section. Section 2055 was in force prior to the enactment of sections 2057, 2058, and the courts had held that it was a complete defense to an action under section 2055 to show that there was a reasonably sufficient fence and that insufficient fences were in fact no fences at all. Held that, as it must be presumed that the Legislature had in mind such rules, there was no conflict between the sections, but it was

*As to the admissibility of evidence of subsequent repairs or other precautions, in negligence cases, see foot-note appended to *Southern Ry. Co. v. Simpson* (C. C. A.), 13 R. R. R. 402, 36 Am. & Eng. R. Cas., N. S., 402; See *v. Wabash R. Co.* (Iowa), 12 R. R. R. 596, 35 Am. & Eng. R. Cas., N. S., 596.

Titus v. Chicago, etc., Ry. Co

the legislative intent that a failure to fence as required by section 2057 should be treated as an entire failure to fence, and that the liability and penalty provided for in section 2055 should then follow.

Appeal from District Court, Marshall County; Obed Caswell, Judge.

Suit to recover double damages for killing plaintiff's horse. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals. Reversed.

J. C. Cook, H. Loomis, and Binford & Snelling, for appellant.
C. H. Van Law, for appellee.

SHERWIN, C. J. The plaintiff's horse went from a pasture through a gate in the defendant's right of way fence and was killed by one of its trains. The gate was an ordinary sliding one, 16 feet long, four 6-inch boards in width, and was fastened by slipping the front end between two posts placed about 6 inches apart. The surface of the ground was nearly or quite level, but the heel of the gate was raised above it from 3 to 7 inches, and, when closed, the front end rested on the ground. The two upper boards of the gate were about 14 inches apart. The proof is conclusive that the gate was closed in the ordinary manner at about 5 o'clock in the afternoon before the horse was killed, and the next morning it was found open, having been pushed back about 18 inches and carried into the pasture about 9 feet. The lower edge of the upper board of the gate clearly showed that it had been a favorite rubbing place for the stock in the pasture, and at the time in question there was horse hair sticking to it, and other indications of its recent use for that purpose. The petition alleged that the gate was insufficient in construction, and no other negligence was charged.

The case is extremely doubtful on the facts, but we are inclined to the view that the evidence relating to the condition of the edge of the upper board sufficiently distinguishes it from the Mears Case, 103 Iowa, 203, 72 N. W. 509, and the Koenigs Case, 98 Iowa, 569, 65 N. W. 314, 67 N. W. 399, to justify the court in submitting the question as to how the gate became open to the jury.

In answer to a special interrogatory, the jury found that the gate was, in fact, opened by the stock in the pasture; and, conceding that such finding was supported by sufficient evidence, it was, then, for the jury to say, from all of the evidence before it, whether the gate was sufficient in construction and fastening. This question was also answered adversely to the appellant's contention, and the finding has such support in the evidence that we cannot disturb it. It having been shown that the gate, if opened by stock at all, was opened in some way by the use of the upper board for rubbing purposes, the question of the space between the upper and the second board became material in determining whether the gate was improperly constructed. The

Titus v. Chicago, etc., Ry. Co

court permitted the plaintiff to show that after the accident in question the defendant had fastened a wire between these two boards, and this, we think, was prejudicial to the defendant. Evidence of subsequent alterations or repairs is generally incompetent, and we find nothing in the record warranting its admission in this case. *Hudson v. C. & N. W. R. R. Co.*, 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692. And because of this error the case must be reversed.

We are also of the opinion that the court should have advised the jury that no particular method of fastening the gate is required by the statute, and that, if the fastening was reasonably sufficient, it was enough to meet the requirements of the law.

The court instructed as follows: "The fence by law required should be constructed either with five barbed wires securely fastened to posts not more than twenty feet apart, or with five boards securely fastened to posts not more than eight feet apart, the fence in either case to be at least fifty-four inches high. There is a failure to fence unless the company builds substantially such a fence as the law prescribes. Such fence includes proper gates, and corresponding in sufficiency, so far as a gate may do so, with said required fence, with proper and sufficient fastenings, at private crossings which are not constructed for open crossings, and such a crossing as is questioned in this action." And, further, that a gate, to be sufficient, must be practically the same as a fence. It is contended that these instructions were erroneous because the action was plainly brought under section 2055 of the Code, which provides for double damages where there is a failure to fence; and it is said that a failure to comply with section 2057 does not make the company liable for double damages. If the defendant is right in this, it is clear that the instructions should not have been given. The provisions of section 2055 were in force long prior to the enactment of section 2057 of the Code, which defines a legal right of way fence, and prior to the enactment of section 2058, which provides a penalty for a failure to fence the track as provided in the preceding section. Before the enactment of these later sections we held that it was a complete defense to an action under section 2055 to show that there was a reasonably sufficient fence. *Lee v. Railway Co.*, 66 Iowa, 131, 23 N. W. 299; *Shellabarger v. Railway Co.*, 66 Iowa, 18, 23 N. W. 158. As the Legislature had not at that time made it necessary to fence the track at all, nor determined what should constitute a sufficient fence, it is manifest that all that could be required of the company was to build a reasonably sufficient fence; but the Legislature had the undoubted right to require fences along the right of way and to designate the kind of fence that should be built to meet such requirement. Before these statutes were enacted, we had also held, in *McKinley v. Railway Co.*, 47 Iowa, 76, that insufficient fences and gates were, in fact, no fences or gates at all, and it must be presumed that the Legislature had in mind such rule and the

Prescott & N. W. Ry. Co. v. Brown

rule as to the fence required to avoid liability under section 2055, when the present statute was enacted; and, if this be true, there can be no serious doubt as to the intent of the statute, which was, we think, among other things, to fix absolutely the kind of fence that should be considered sufficient to defeat liability. In other words, it is said, in effect, that, unless the fence built complies with the requirement of the statute, it is in fact no fence, and affords no protection against the liability imposed by other provisions of the law. We find no conflict between the statutes, and believe that it was the legislative intent that a failure to fence as required by section 2057 should be treated as an entire failure to fence, and that the liability and penalty provided for in section 2055 should then follow.

As we have heretofore said, there was error in admitting certain testimony, and for that reason the judgment is reversed.

Reversed.

 PRESCOTT & N. W. RY. CO. v. BROWN *et al.*

(Supreme Court of Arkansas, April 1, 1905.)

[86 S. W. Rep. 809.]

Injuries to Stock—Value—Burden of Proof.—Under Kirby's Dig., § 6137, providing that allegations of value or of amount of damages shall not be considered as true by the failure to controvert them, the failure of defendant to controvert the value of the animal killed, and for which suit is brought, does not relieve plaintiff of the burden of proving such value, nor deprive him of the right to open and close the argument.

Same—Contributory Negligence—Custom of Riding Animal along Track.—The fact that plaintiff had, prior to the time that his mule was killed by defendant railroad, frequently ridden the mule along the track of the railroad for some distance at the place where it was subsequently killed, does not establish contributory negligence in plaintiff at the time of the killing, such as to preclude him from recovering the value of the mule.

Duty to Lookout for Stock.*—Under the express provisions of Kirby's Dig., § 6607, it is the duty of persons running trains to keep a constant lookout for persons and property upon the track, and the railroad is liable for all damages resulting from neglect to keep such lookout, and the burden is on it to show that it has kept a lookout.

Appeal from Circuit Court, Hempstead County; Joel D. Conway, Judge.

Action by J. U. Brown and another against the Prescott & Northwestern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Instruction No. 3 asked by defendant, and referred to in the

*See foot-notes appended to *Airikainen v. Houghton County St. Ry. Co.* (Mich), 14 R. R. R. 178, 37 Am. & Eng. R. Cas., N. S., 178; extensive note appended to *Davis v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 188, 35 Am. & Eng. R. Cas., N. S., 188.

Prescott & N. W. Ry. Co. v. Brown

opinion, is as follows: "The jury are instructed that no one has the right to ride on or along the roadbed of a railway, and that every one so riding is a trespasser; and if in this case the jury believe from the evidence that the plaintiff R. Fultz, by frequently riding the mule in question on and along defendant's roadbed, so accustomed said mule to travel on said roadbed that when it got loose it naturally took the roadbed, instead of the other route, then the plaintiff will be guilty of contributory negligence, and you will find for the defendant."

This was an action by appellees for damages for the killing of a mule on appellant's railroad. The complaint alleges that in January, 1901, the defendant, while operating its train in Hempstead county, carelessly and negligently caused its train to run over and kill a mule belonging to the plaintiff, of the value of \$117.50; that the defendants did not post any notice of the killing of said mule, and keep the same posted, as required by law; that by reason of the negligent killing of said mule the plaintiffs have been damaged in the sum of \$117.50, and by failure of the defendant to post the notice of the killing of said mule, and to keep the same posted, as required by law, the defendant is liable to the plaintiffs in the further sum of \$117.50. Plaintiffs therefore pray the court for judgment against the defendant for the sum of \$235, and for their costs and proper relief. To this complaint defendant answered as follows: It admits that it killed the mule in question, but says that such killing was without negligence on its part, and that it is therefore not liable in damages for said killing; that the killing of said mule was caused by the negligence of its owners, and therefore this defendant is not liable in damages for said killing. When the case was called for trial, appellant moved the court for permission to open and conclude the case. This request and motion was by the court overruled, and defendant excepted, and had its exceptions made of record. This motion was renewed at the close of the evidence and instructions, and was again denied. There was a verdict for \$100, and the court increased the amount \$100 for failing to post, and rendered judgment for \$200.

C. C. Hamby, for appellant.

J. O. A. Bush, for appellees.

WOOD, J. (after stating the facts). 1. The question of negligence was submitted to the jury upon proper instructions, and there was evidence to support the verdict.

2. Appellee, under the pleadings and proof, had the right to open and close the argument. The burden of proof was upon him. Section 6137 of Kirby's Digest provides that "allegations of value, or of amount of damages, shall not be considered as true by the failure to controvert them." It is held in *Ry. v. Taylor*, 57 Ark. 136, 20 S. W. 1083, that (quoting syllabus) "the right to open and close the argument abides with the plaintiff so long as he has anything to prove in order to recover a

St. Louis Southwestern Ry. Co. v. Underwood

verdict for more than nominal damages.” The failure to controvert the value of the animal did not relieve appellee of the burden of proving it, in order to show the extent of his injury or damage. *Derrick v. Cole*, 60 Ark. 394, 30 S. W. 760; *Ry. v. Rhea et al.*, 44 Ark. 258.

3. It is urged that the court ignored the doctrine of contributory negligence, in refusing to grant appellant’s request for instruction No. 3 (reporter set out in note), and in failing to mention it in the instructions given. There is nothing in the evidence to warrant an instruction upon the subject. The fact that appellee on one occasion, some time prior to the killing (just when it is not shown), was seen riding the mule that was killed along the track of the railroad for some distance at the place where the mule was killed, would not even tend to establish contributory negligence. Yet this was all the evidence upon which appellant predicated its request for instruction No. 3. We are unable to see how riding the mule one time along appellant’s railroad 50 yards at the place where it was afterwards killed would tend to establish contributory negligence in appellee at the time of the killing. The idea is far fetched.

Appellant claims that it was error to charge the jury that the burden was upon it to show that it kept a lookout for stock upon the track, and contends that it was not the duty of the appellant to keep a lookout for stock, under the decision of this court in *Ry. v. Kerr*, 52 Ark. 162, 12 S. W. 329, 5 L. R. A. 429, 20 Am. St. Rep. 159. That case was decided at the May term, 1889. In April, 1891, the Legislature passed the lookout statute (Kirby’s Dig. § 6607). Since then it has been the duty of railroads to keep a lookout for property on their tracks, and in case of injury to such property the burden is upon the railroad to show that the lookout was kept, in order to absolve them from the charge of negligence in failing to keep such lookout. *Ry. v. Taylor*, 57 Ark. 136, 20 S. W. 1083; *Ry. v. Russell*, 62 Ark. 182, 24 S. W. 1059; *Ry. v. Russell*, 64 Ark. 236, 41 S. W. 807; *Ry. v. Pritchett*, 66 Ark. 46, 48 S. W. 809.

There was no error. Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. UNDERWOOD.

(Supreme Court of Arkansas, April 1, 1905.)

[86 S. W. Rep. 804.]

Personal Injuries—Amount of Damages.—In an action for personal injuries, evidence examined, and held sufficient to sustain a verdict for \$500.

Railroads in Streets—Unloading—Care Due Pedestrians.*—A railroad whose line occupies a public street is liable for its failure

*See generally, *Eichorn v. New Orleans & C. R., L. & P. Co.* (La.), 13 R. R. R. 128, 36 Am. & Eng. R. Cas., N. S., 128.

St. Louis Southwestern Ry. Co. v. Underwood

to employ reasonable means and exercise reasonable care in the unloading of its cars to avoid injuring a person passing along the street.

Appeal from Circuit Court, Monroe County; Geo. M. Chapline, Judge.

Action by Ross Underwood, by his next friend, against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 28th day of October, 1902, the appellee, a minor, by his next friend, A. J. Hughes, instituted this action, and alleged on the 4th day of July, 1902, in the town of Brinkley, an employee of the appellant negligently threw a trunk out of its car, which fell on the appellee's foot, without his fault; that he was passing over Memphis avenue, upon which the appellant's track is laid. The trunk fell with such force as to mash his foot, and he suffered great pain therefrom, and asks that he be awarded \$1,000 damage. The appellant answered, denied negligence or carelessness on the part of its employees; denied the trunk fell or struck the appellee, or that it mashed his foot; denied appellee was passing Memphis avenue, as alleged in the complaint; denied the appellee suffered any pain or that he received any injury at the time mentioned or at any other time. A. J. Hughes testified as follows: "The Lonoke train had arrived. We were going to it. We were at the end of the Cotton Belt Depot. I intended to go to Lonoke, and the children were to remain in Brinkley. While passing the Cotton Belt Depot the train arrived. They were unloading baggage from the baggage car. A trunk was thrown over on the truck, overshot it, and fell to the ground eight or ten feet from the car, and struck the appellee. Knocked him against the banister, and injured his foot and ankle. It was a bad sprain. Flesh all torn off his foot. He suffered a good deal of pain, and suffered for a month, when he would walk or stand upon it all day. He hobbled around, but it hurt him. He wore his shoes off and on probably a week after the injury, but did not wear them regularly for a month. Witness was up with the appellee during the night for a couple or three weeks after the injury. He did not labor. The Cotton Belt arrived at 3 or 4 o'clock in the afternoon. Witness and the appellee were going to the Choctaw Depot. The train was there. We were going by the Cotton Belt train. I suppose they call it a depot, alongside of the train. We were going north on the Cotton Belt." Appellee testified they were going by the Cotton Belt Depot. In passing a baggage car, the baggageman threw a trunk out on the truck, and it fell from the truck and hit his left foot—hit his toe and struck his ankle. His uncle put some liniment on it. He suffered from pain a good deal afterwards; ankle swelled. Appellee was earning from 50 to 75 cents a day. Did not work for a month. Bought two bottles of liniment. Pretty bad hurt. Broke the skin a little at the end of the toe. Slight scar there.

St. Louis Southwestern Ry. Co. v. Underwood

Baggageman was fixing to throw the trunk out. He turned his head, and it struck his foot as he made the step. Witness went about the town of Lonoke shortly after the accident. The appellee is 15 years old. Maggie Underwood testified she is a sister of appellee. She was with him when he was hurt. He suffered a great deal. They went to Brinkley on the 4th of July. They were going north, walking pretty fast. There were a great many people on the walk. The appellee was behind, and in passing the baggage car the trunk was thrown on a truck, and it bounced over and hit appellee's foot. Knocked him over against some irons. Witness was in front of Ross when he got hurt. They were going to the Choctaw Depot with their uncle to tell him good-bye. Chas. Madison testified he supposed the boy was standing about the trucks. The train porter threw the trunk out. It was witness' duty to catch it. One of the trunks was a little too swift, and it went over the truck and struck the boy. The boy grabbed his leg and commenced to cry. It was a medium-sized trunk. A. M. Finney testified he remembered the trunk striking the boy. Thought the boy was standing still when he saw him. When the trunk was thrown out of the baggage car onto the truck, he and the porter attempted to catch it, but it was a little too swift. He could not hold it, and it struck the boy's foot. The truck was very close to the car. The trunk struck one corner of it, and fell on the platform. He saw the boy standing near the truck before the trunk came out of the car. Sid Simpson testified he was marshal of the town of Lonoke. He saw the appellee on the streets of Lonoke frequently during the month of July, 1902, and he never saw anything wrong with him at all. He saw him very frequently. Did not remember if he saw him every day or not, but he was not limping when he saw him. Never heard any complaint about the accident. J. M. Cobb testified he was a resident of Lonoke. Knew the appellee. Could not tell precisely when he left there, but he saw him in the month of July every day, or perhaps two or three times a day, walking up and down the streets. He saw no evidence of injuries to the boy's foot. He noticed his foot wrapped up. Sometimes he had it wrapped up for two or three days. He went about as usual. Could detect no difference in his walking. The appellee, and his next friend, Mr. Hughes, worked around Lonoke at common work. He thought he paid him 50 cents a day. R. J. Hawkins, of Brinkley, testified he saw the appellee on the 4th of July walking around, after the accident. He limped a little. Did not think his foot was bruised to amount to anything. Boy had on his shoes and stockings. This is all the evidence. The court then gave the following instructions: "The court instructs the jury that if you find from the preponderance of the evidence that on July 4, 1902, a baggageman, while in the employ of the appellant (defendant) on defendant's train, in handling a trunk in defendant's baggage car, so negligently and carelessly handled said trunk that through

St. Louis Southwestern Ry. Co. v. Underwood

said negligence and carelessness the trunk fell on plaintiff's foot and caused the injury complained of, you will find for plaintiff in such sum as will compensate him for the injury sustained and pain suffered, as shown by the proof, not exceeding the sum of \$1,000;" to which exceptions at the time were saved. "The jury are instructed that if they find from the evidence that the plaintiff was standing upon the platform of the defendant in front of the baggage car from which its employees were handling trunks, and that they used ordinary care in the handling of them, and that one of the trunks accidentally overshot the truck and struck the plaintiff, he cannot recover for such injuries." The defendant asked the court to give the following instruction: "The jury are instructed that if they find from the evidence that the plaintiff, Ross Underwood, was standing in front of the car from which the employees of the company were handling trunks, and that one of the trunks, in removing them from the car, accidentally overshot the trucks which were used for handling them, without willful or wrongful intention on the part of such employees to inflict an injury upon the plaintiff, or any one else, then the defendant would not be liable for such injuries, and your verdict should be for the defendant." This the court refused. The verdict was for \$500, and judgment accordingly.

Sam H. West and J. C. Hawthorne, for appellant.
C. F. Greenlee, for appellee.

WOOD, J. (after stating the facts). 1. The evidence is fully set out. Giving the appellee the benefit of its utmost probative force, which is the rule here, we do not feel warranted in saying that the verdict is excessive.

2. The contention that the instruction was erroneous in assuming that appellee was rightfully in the place where he was injured, and that appellee could not recover unless the proof showed gross and wanton negligence on the part of appellant, is not correct. The complaint alleges "that the accident did not occur through any fault of his [plaintiff], but that he was passing along Memphis avenue, through which defendant's track is laid." The appellant denied that plaintiff "was passing Memphis avenue, through which defendant's track is alleged to be laid." It will be observed that appellant does not deny that its track was laid through Memphis avenue. Therefore it appears that appellant's track was laid on Memphis avenue. The proof shows that Underwood was passing along by the side of the train, by the baggage car. We gather from the evidence that appellee, Underwood, was walking on the ground or walk by the side of the train and by the baggage car from which the trunk was thrown. His sister, who was near them, says, "There were a great many along, and my brother was right along behind," etc. The allegations of the complaint and the evidence show that at the time of his injury appellee was upon Memphis avenue, a public thoroughfare. "An avenue is a passage; a way or an opening

Marshall v. Green Bay & W. R. Co

for entrance into a place; any opening or passage by which a thing is or may be introduced or approached; (2) a roadway; (3) a street." Century Dictionary. "Avenue," "a broad street." Webst.. Dict. "A street." A Thesaurus of the English Language. "A street is a road or public way in a city, town, or village." Elliott, Roads and Streets. In *Ry. v. Neely*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616, the railway company was operating and moving one of its freight trains on and along Elm street in the town of Warren. At this time Neely was returning from his residence to his office on the same street. While the freight train was passing him, a car door fell upon him from its place in a car in the train, and inflicted an injury. In that case we said: "Here the appellee was upon a public street at the time he was hurt. He was no trespasser. The railway company owed him the duty to employ reasonable means and exercise reasonable care to avoid injuring him." This doctrine rules the case at bar, rather than the principle invoked by appellant that the railway company owed appellee no duty except to use ordinary care not to injure him after having discovered his place of peril; or, in other words, that it was the duty of the railway company only to avoid such gross and wanton negligence as was equivalent to a willful or intentional injury. The rule established by the authorities cited by appellant is applicable only in the case of a trespasser. It is not applicable to the undisputed facts of this record. The court did not err, therefore, in assuming that appellee was rightfully in the place where he was injured, and in refusing the request of appellant for an instruction to the effect that appellant was not liable unless its employees inflicted the injury upon appellee with "willful and wrongful intention."

Affirmed.

MARSHALL v. GREEN BAY & W. R. Co.

(Supreme Court of Wisconsin, May 2, 1905.)

[103 N. W. Rep. 249.]

Railroads — Crossing Accident — Contributory Negligence.*—One who, while driving a team, is struck by a train at a crossing, is barred by contributory negligence from recovery, though he testifies that he looked and listened, where, had he looked along the track at any time while within 68 feet of the track, he could have seen the train approaching.

Appeal from Circuit Court, Waupaca County; Chas. M. Webb, Judge.

Action by Daniel Marshall against the Green Bay & Western

*See foot-note appended to *Dolfini v. Erie R. Co.* (N. Y.), 12 R. R. R. 291, 35 Am. & Eng. R. Cas., N. S., 291; *Chicago & N. W. Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584.

Marshall v. Green Bay & W. R. Co

Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Action for personal injuries. The complaint was to this effect: January 10, 1902, plaintiff,—riding in a buggy drawn by a span of horses, driven by him,—was a traveler on the public way, known as the “Northport and Royalton Road,” in the town of Mukwa, Waupaca county, Wis., where it crosses defendant’s railway track in section 6, township 22. He was destined to a point requiring him to pass over the crossing. A short time before, defendant lowered its track at such crossing so that a person approaching it as plaintiff did could not see a train coming from the east till he arrived within a few feet of the rails. As he was passing over the same, in the exercise of ordinary care, defendant’s servants in charge of one of its trains caused the same to approach and go over the crossing at a speed of about 40 miles an hour, without giving any warning thereof by sounding the engine bell or blowing the whistle. By reason of the situation of the track as to the highway and the manner in which the train was operated, as indicated, plaintiff was struck by the engine and severely injured, to his damage in the sum of \$15,000. Performance of the conditions precedent to the commencement of this action was pleaded.

Defendant answered admitting that its train at the time and place alleged injured the plaintiff, putting in issue all allegations as to fault on its part and pleading contributory negligence. The evidence was to this effect: The railway track ran nearly east and west at and in the vicinity of the crossing. The track on the side plaintiff approached thereto and to the east lay at an angle with the highway of about 36 degrees, so that for him to see an approaching train coming from that direction it was necessary to look to the left and partially backward. He wore an overcoat with the collar turned up. It was a cold day and he was dressed accordingly. He was in a covered buggy with the curtains so arranged that he could see out at each side. It was dark and the wind was blowing in an easterly direction. There was some snow on the ground. He knew the location of the track with reference to the highway. He saw it about an hour before the accident and then observed that it had been lowered several feet from its location when he last before passed that way. He knew it was about time for a train to arrive at the crossing, and was uncertain whether it had already done so or not. For a considerable distance from the track, as he approached it, one circumstanced as he was could readily have seen a train coming from the east had he looked for that purpose. From a point about 68 feet from the track one so circumstanced could readily have seen a train had there been one anywhere within a distance of upwards of 1,500 feet from the crossing. From the point 68 feet from the track thereto the opportunity to observe an approaching train coming from the east, in case of there being one, improved. There were some interferences be-

Marshall v. Green Bay & W. R. Co

fore reaching such point with the view to the east in a line with the track, but after approaching to within about 250 feet of the crossing such interferences were not such as to prevent one from readily seeing a train in that direction at any point on the track for a distance of about half a mile, in case of there being one, the interferences only being sufficient to interrupt the line of vision for a space of about 6 feet. When plaintiff arrived at a point 40 or 50 feet from the track, the train which did the mischief could not have been to exceed 700 feet away. It must then have been in plain sight from where he was, and the headlight on the engine must have shown upon the rails in front of him and to some extent have illuminated the crossing. His sight and hearing were good. He said he looked and listened repeatedly for a coming train, the last time when he was at the point last spoken of, and did not hear or see any; that the first indication to him of the presence of one was a flash of light at the crossing about the instant he was struck.

At the close of the evidence defendant's counsel moved the court to direct a verdict of no cause of action because the evidence conclusively established contributory negligence on plaintiff's part. The motion was granted and judgment rendered accordingly.

E. L. & E. E. Browne, for appellant.

Green, Fairchild, North & Parker, for respondent.

MARSHALL, J. (after stating the facts). There is no principle in the law of negligence better settled than the one that a person before entering upon a railway track should look both ways and listen to discover if there is a train approaching and in such close proximity as to render it dangerous to proceed. The presence of a railway track is such an admonition of the probability of danger to one entering thereon, that nothing but physical impossibility will excuse his neglect to use his senses of sight and hearing to discover whether a train is dangerously near or not before so doing. A person is not only bound to look and listen for such a train before entering upon a railway track, but is bound to hear and see one, if there is such, and reasonable attention to the matter will enable him to do so, and if he attempts to cross the track in violation of such duty or in the face of danger after discovering it, he takes in his own hands the entire responsibility for what may follow as to injuries to himself, though produced in part by negligent conduct of the railway trainmen. One cannot reasonably expect the law to hold others responsible for his personal safety, as regards their mere negligence, if he sees fit to disregard such safety himself.

Counsel contend this case does not fall within the general rule as to crossing cases since appellant testified distinctly as to having exercised a high degree of care to discover an approaching train and failed to see or hear any, and the situation was such on account of inconvenience in making an efficient observation, by

O'Leary v. Chicago, etc., Ry. Co

reason of the location of the track as regards the highway, and some slight interferences with the line of vision in the direction of the train till he was pretty close to the track, that it is not entirely improbable that he looked and listened, as he testified he did, and yet failed to discover the danger. We are unable to discover any ground whatever for disturbing the decision of the trial court that had appellant looked easterly upon the track at any time after passing over the 68 feet before he reached the same he must have seen the approaching train, and further that if he depended upon his hearing he must have heard the train. Having such an opportunity to know of its approach he was bound to improve it efficiently. The court did right in taking the case from the jury. There was no room in the evidence for an honest finding that appellant performed the duty he owed to himself, and yet failed to see the train till it was too late for him to avoid it. Where a physical situation renders the right of a matter clearly beyond all reasonable controversy, there is no accounting for testimony to the contrary, except upon the theory of mistake or willful false swearing, and in such circumstance the more positive and definite the testimony the greater the indication of fault, greater than can be reasonably attributed to mere mistake. In such a case, regardless of the amount of evidence from the mouths of witnesses, there is no conflict to be solved by a jury, because no just verdict can ever be rendered contrary to all reasonable probabilities.

As we view the case, it is plainly ruled by *Cawley v. La Crosse City R. Co.*, 101 Wis. 145, 77 N. W. 179, *White v. The Chicago & N. W. Ry. Co.*, 102 Wis. 489, 78 N. W. 585, *Steber v. C. & N. W. Ry. Co.*, 115 Wis. 200, 91 N. W. 654, and similar cases.

The judgment is affirmed.

O'LEARY v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, May 4, 1905.)

[103 N. W. Rep. 362.]

Persons Repairing Track—Negligence—Signals.—The failure of employees to give warning of the approach of the train to a point where men and teams are known to be at work about the track may be negligence as a matter of fact, though not negligence per se arising from a failure to give the signals prescribed by Code, § 2072, on approaching highway crossings.

Ordinances.—Proof that a municipal ordinance was adopted at a specified date is prima facie proof that it is in force at a subsequent date.

Collision with Team—Proximate Cause—Speed in Violation of Ordinance.*—Proof that a train was operated at a speed prohibited

*As to the care required of trainmen to avoid collisions with animals on or near track, see foot-note appended to *Nashville, etc., R. Co. v. Davis* (Tenn.), 13 R. R. R. 432, 36 Am. & Eng. R. Cas., N. S., 432.

O'Leary v. Chicago, etc., Ry. Co

by a municipal ordinance is evidence from which a jury may find that the excessive rate of speed was the proximate cause of an injury to a team employed in repairing the track and struck by the train.

Same—Discovered Peril—Testimony of Engineer.—The testimony of the engineer in charge of a train that he did all he could to stop the train before injury to a team was not conclusive on the jury where there was evidence that the train might have been stopped after the discovery of the peril and before the injury.

Unattended Team—Care Required of Trainmen.†—The employees in charge of a train on discovering that an unattended team employed in repairing the track is approaching the track must exercise ordinary care to stop the train and avoid injury.

Same—Contributory Negligence.—A person left his team unattended and untied near a railroad track. It was used to standing unattended and untied. It passed onto the track, and was injured by being struck by a train. Held, that he was not guilty of contributory negligence as a matter of law.

Appeal from Superior Court of Cedar Rapids; J. H. Rothrock, Judge.

Suit to recover the value of a team of horses killed by one of the defendant's trains. There were a verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

Carroll Wright, John I. Dille, and S. K. Tracy, for appellant.
Redmond & Stewart, for appellee.

PER CURIAM. The plaintiff was plowing with the team that was killed in a barrow pit along the defendant's road, and was engaged with other men and teams in widening the defendant's roadbed. His horses were gentle, and used to standing without attendants and without being tied. A team belonging to his

†For authorities in this series on the subject of contributory negligence where animals are struck by trains, see *Sanger v. Chesapeake & Ohio Ry. Co.* (Va.), 13 R. R. R. 482, 36 Am. & Eng. R. Cas., N. S., 482 (fact that animals were trespassing no defense under Virginia statute requiring right of way to be fenced); *Brunick v. Ann Arbor R. Co.* (Mich.), 6 R. R. R. 591, 29 Am. & Eng. R. Cas., N. S., 591 (error in withdrawing question of cattle driver's negligence from jury); *Atkinson v. Chicago, etc., Ry. Co.* (Wis.), 9 R. R. R. 423, 32 Am. & Eng. R. Cas., N. S., 423 (failure of owner of horse, week prior to accident, to close track gate could not affect his right to recover); *Ensley v. Detroit United Ry.* (Mich.), 8 R. R. R. 452, 31 Am. & Eng. R. Cas., N. S., 452 (insufficiency of evidence); *Kotila v. Houghton County St. Ry. Co.* (Mich.) 8 R. R. R. 808, 31 Am. & Eng. R. Cas., N. S., 808 (allowing cow to be at large, and great speed of car down grade, where it was not shown that car could have been checked in time); *Wright v. Minneapolis, etc., R. Co.* (N. Dak.), 9 R. R. R. 471, 32 Am. & Eng. R. Cas., N. S., 471 (unlawfully at large where track not required to be fenced); *Perrault v. Minneapolis, etc., R. Co.* (Wis.), 7 R. R. R. 467, 30 Am. & Eng. R. Cas., N. S., 467 (letting cattle run at large as a defense under Wisconsin statute requiring right of way to be fenced); *Mitchell v. Union Terminal Ry. Co.* (Iowa), 10 R. R. R. 75, 33 Am. & Eng. R. Cas., N. S., 75 (laying down reins for brief moment was not a violation of ordinance requiring teams to be hitched); note appended to *Davis v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 188, 35 Am. & Eng. R. Cas., N. S., 188 (unlawfully at large); *Gulf,*

O'Leary v. Chicago, etc., Ry. Co

father and working on a wheel scraper in the pit ran away, whereupon the plaintiff joined others in their pursuit, leaving his own team standing some 50 feet from the defendant's track. Shortly after he had left them they walked to the track, and while attempting to cross it were struck by the train. There were only five or six cars in the train. When the horses in question were first discovered by the fireman they were walking slowly toward the track about 70 feet ahead of the engine, and after striking them the train ran 200 feet or more before it was stopped. The petition alleged negligence in failing to give signals, in running at an unlawful rate of speed within the city limits of Ottumwa, and in failing to stop the train after the peril to the team was discovered by the trainmen. There was evidence that the work in question had been going on for some time before the accident, and evidence tending to show that no signal of the approach of the train was given. The court instructed, in effect, that a failure to give any warning or signal of the approach of the train would justify a finding that the defendant was negligent, and this is complained of on the ground that there was no evidence tending to prove that there was a "road crossing at such proximity to the place of the accident as would require the ringing of the bell." There was evidence of a public crossing of some kind about 200 feet east of the place in question, but whether this was a regular highway or street does not clearly appear. The instruction made no reference to the statute (Code, § 2072), and it is doubtful whether the court intended to instruct that a failure to give the statutory signals would be negligence per se. If there was no public highway at the point indicated, it would not be negligence per se to omit the signals, and yet the defendant

etc., Ry. Co. v. Clay (Tex.), 2 R. R. R. 28, 25 Am. & Eng. R. Cas., N. S., 28 (using pasture with knowledge of construction of fence without openings, in action for loss of stock drowned through failure to leave openings in railroad fence); Herrell v. Chicago, M. & St. P. Ry. Co. (Wis.), 4 R. R. R. 337, 27 Am. & Eng. R. Cas., N. S., 337 (leaving gate open, and allowing animal to trespass); Union Pac. R. Co. v. Buzicka (Neb.), 5 R. R. R. 64, 28 Am. & Eng. R. Cas., N. S., 64 (peremptory instruction for defendant not warranted); Texas & P. Ry. Co. v. Seay (Tex.), 3 R. R. R. 866, 26 Am. & Eng. R. Cas., N. S., 866 (permitting animals to run at large no defense where injury was caused by failure to fence); note, 18 Am. & Eng. R. Cas., N. S., 466 (leaving team unhitched near crossing). See also, note, 5 Am. & Eng. R. Cas., N. S., 300; note, 15 Am. & Eng. R. Cas., N. S., 561 (whether contributory negligence affects right to recover); note, 6 Am. & Eng. R. Cas., N. S., 617 (gate left open by landowner); Silcock v. Rio Grande W. Ry. Co. (Utah), 18 Am. & Eng. R. Cas., N. S., 459 (leaving horse untied near crossing); Cornell v. Manistee & N. E. R. Co. (Mich.), 11 Am. & Eng. R. Cas., N. S., 263; Croft v. Chicago G. W. Ry. Co. (Minn.), 11 Am. & Eng. R. Cas., N. S., 652; Hutchinson v. Chicago, etc., Ry. Co. (S. Dak.), 5 Am. & Eng. R. Cas., N. S., 714; Sauls v. D. W. Alderman & Sons Co. (S. Car.), 15 Am. & Eng. R. Cas., N. S., 558 (where negligence the proximate cause); Cole v. Duluth, S. S. & A. Ry. Co. (Wis.), 17 Am. & Eng. R. Cas., N. S., 749 (no defense under Wisconsin statute); Western & A. R. Co. v. Strickland (Ga.), 23 Am. & Eng. R. Cas., N. S., 510 (leaving team unsufficiently hitched).

O'Leary v. Chicago, etc., R. Co

might be guilty of negligence in not giving them independently of the statute. *Artz v. Chicago, Rock Island & Pacific Railway Co.*, 34 Iowa, 153; *Gates v. Burlington, C. R. & M. Ry. Co.*, 39 Iowa, 45. The failure to give warning of the approach of a train to a point where men and teams are known to be at work on or about the track may be negligence as a matter of fact, though not negligence per se. Iowa cases, *supra*, and 2 *Thompson on Negligence*, §§ 1562-1566. And we think the instruction complained of, when construed in the light of the evidence and with the other instructions, did no more than to submit this question to the jury for its finding. There was evidence tending to show that the train was running at a rate of speed prohibited by an ordinance of the city of Ottumwa. The ordinance was put in evidence without objection, and purported to have been adopted in 1898. We think this a sufficient *prima facie* showing that it was in force at the time of the accident, and that there was evidence from which the jury might have concluded that the high rate of speed was the proximate cause of the accident. There was also evidence tending to show that the train might have been stopped after the trainmen discovered the peril of the team; hence the court properly instructed on that question. The fact that the engineer testified that he did all that he could to stop his train was not conclusive. When it was discovered that the team was approaching the track unattended, it was the duty of those in charge of the engine to avoid an accident by stopping the train, if possible, in the exercise of ordinary care, and if they failed in this respect they were negligent. It will not do to say that the trainmen might speculate as to whether the team would stop before reaching the track, or as to whether the train or team would reach a given point first. The team was in motion, and going toward a danger point, and to avoid the possibility of a collision it was clearly the duty of the defendant's employees to have their train under absolute control. The questions of negligence and contributory negligence were clearly for the jury, and were properly submitted. It was not negligence per se to leave this team as the plaintiff did, and the instruction asked by the appellant so declaring was rightly refused. We find no error requiring a reversal of the case, and the judgment is therefore affirmed.

Affirmed.

ILLINOIS CENT. R. CO. *v.* ELLIOTT.

(Court of Appeals of Kentucky, Oct. 13, 1904.)

[82 S. W. Rep. 374.]

Injury to Employee—Negligence—Question for Jury.—In an action for injuries to a servant, evidence as to defendant's negligence held to present a question for the jury.

Fellow Servants.*—Where plaintiff was injured by the alleged negligence of his superior, under whose orders he was working, such superior servant was not plaintiff's fellow servant, though he himself was subject to the orders of another while engaged in the work at hand.

Same—Gross Negligence—Liability of Master.*—Where plaintiff was injured by the alleged negligence of his superior, under whose orders plaintiff was working at the time, such superior being engaged in the same work with plaintiff, defendant was not liable unless the negligence of such superior servant was gross.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by Henry N. Elliott against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. P. Taylor, Pirtle & Trabue, and *J. M. Dickerson*, for appellant.

M. L. Heavrin and *E. M. Woodward*, for appellee.

HOBSON, J. On May 15, 1903, there was a wreck at McHenry on appellant's road. Appellee, Elliott, was a carpenter in its service working under a foreman, and W. C. Waggoner was supervisor of bridges and buildings, and as such had charge of these men, being superior in authority to the foreman. Waggoner took the men to the wreck, and was in charge of them after they reached the wreck, although the wrecking foreman had general charge of the wrecking operations. Waggoner directed Elliott to go under a coach that was off the track, with wrenches and a hammer, and disconnect the brake. While Elliott was working under the car, according to his testimony, Waggoner went around to the front of the car to disconnect the brake, and in doing this, after he got the nut off of the handle of the brakebeam, he snatched the beam four or five times with force, causing it to fly back and strike Elliott violently in the side of his stomach producing hernia. This is Elliott's statement. Waggoner says that he was simply holding a light, and did not snatch the beam at all, and that Elliott was in no way hurt. It is very clear from the evidence that Elliott is very badly ruptured, but there is proof that he was ruptured before, although he testifies that he had been operated on for this, and had been entirely relieved. While the evidence was conflicting, it was properly left to the jury. Waggoner was not a fellow servant with Elliott. He was Elliott's superior, under whose orders Elliott was working; although Waggoner was himself subject to the order of the wreck-

*See note at end of case.

Note

ing foreman while working at the wreck. But, while Waggoner was the superior of Elliott, and not a fellow servant, he was at the time engaged in the same work with Elliott, and the company is not responsible for Elliott's injury by reason of the negligence of Waggoner, unless his negligence was gross. *Illinois Cent. R. R. Co. v. Coleman*, 59 S. W. 13, 22 Ky. Law Rep. 878; *Board v. C. & O. R. R. Co.*, 70 S. W. 625, 24 Ky. Law. Rep. 1079, and cases cited. The court allowed the jury to find for the plaintiff if Elliott was injured by the negligence of Waggoner, and failed to instruct them, as held in the cases cited, that there must be gross negligence on the part of the superior to render the defendant liable. This was error, and we cannot say that it was not prejudicial. Whether the negligence of Waggoner was gross is a question for the jury under all facts and circumstances.

Judgment reversed, and cause remanded for a new trial.

NOTE.

FELLOW SERVANTS—SUPERIOR-SERVANT LIMITATION OF FELLOW-SERVANT RULE.

CROSS REFERENCES.

Foreman and Hands, see foot-note appended to *Hooe v. Boston & N. St. Ry. Co.* (Mass.), 14 R. R. R. 288, 37 Am. & Eng. R. Cas., N. S., 288; foot-note appended to *Whittlesey v. New York, etc., R. Co.* (Conn.), 13 R. R. R. 104, 36 Am. & Eng. R. Cas., N. S., 104.

Conductor and His Train Crew, see note appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 14 R. R. R. 715, 37 Am. & Eng. R. Cas., N. S., 715.

Engineer and Other Members of His Train Crew, see note appended to *Chicago & A. R. Co. v. Vipond* (Ill.), 14 R. R. R. 295, 37 Am. & Eng. R. Cas., N. S., 295.

Train Dispatchers, see foot-note appended to *McHugh v. Manhattan R. Co.* (N. Y.), 14 R. R. R. 284, 37 Am. & Eng. R. Cas., N. S., 284; foot-note appended to *Virginia & S. W. Ry. Co. v. Clowers* (Va.), 13 R. R. R. 170, 36 Am. & Eng. R. Cas. N. S., 170; *Northern Pac., Ry. Co. v. Dixon* (U. S.), 11 R. R. R. 368, 34 Am. & Eng. R. Cas., N. S., 368.

Yard Masters and Road Masters, see foot-note appended to *McDaniel v. Charleston & W. C. R. Co.* (S. Car.), 15 R. R. R. 794, 38 Am. & Eng. R. Cas., N. S., 794; *Shaw v. Manchester St. Ry.* (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

SCOPE OF NOTE.

The purpose of this note is not to show to what extent the superior-servant limitation of the fellow-servant rule has been recognized by statutory enactments, but only to designate the jurisdictions, respectively, in which it has been adopted or rejected as a common-law doctrine.

DEFINITION.

In Ohio, where the superior-servant limitation originated, and is sustained in its most unrestricted form, the limitation, as defined by the supreme court of the state is that the common master is liable for injury to a servant which was caused by the negligence of a fellow-servant to whom the master had delegated authority over the injured servant. *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Berea Stone Co. v. Kraft* 31 Ohio St. 287; *Lake Shore,*

Note

etc., Ry. Co. *v.* Lavelley, 36 Ohio St. 221, 5 Am. & Eng. R. Cas. 549; Pittsburg, etc., Ry. Co. *v.* Ranney, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. 533; Pittsburg, etc., Railroad Co. *v.* Lewis, 33 O. St. 196.

LIMITATION REJECTED BY WEIGHT OF AUTHORITY.

It will be found from an examination of the authorities in this note that the superior-servant limitation is rejected by an overwhelming weight of authority; and that the limitation, or modifications of it, is recognized as a common-law doctrine only in Arkansas, Illinois, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Carolina, Ohio, Tennessee, Texas, Utah and Washington.

"McKinney on Fellow Servants."—In "McKinney on Fellow Servants," 166, the author says: "The doctrine of the superior servant limitation, on the other hand, being principally an erroneous deduction from the language of the old reports wherein certain servants are called vice principals, is founded upon false theories, and its systematic and consistent application is impossible. It cannot be a correct rule of law."

Cooley on Torts.—Judge Cooley says (Cooley Torts, 543): "In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who at the time of the injury was under the general direction and control of another, who was intrusted with the duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts and omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could this distinction be admitted whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not negligent himself, but also that any negligence of others in the same employment be properly guarded against by him so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it."

Judge Dillon.—Judge Dillon, in 24 Amer. Law Rev. 175, says: "The master owes certain defined, personal, unalienable, nonassignable duties towards servants. These duties may be devolved on others by the master, but not without recourse on him. * * * In the general American law, as I understand it, the doctrine of vice principal exists to this extent, and no further, viz: That it is precisely commensurate with the master's personal duties towards his servants. As to these, the servant who represents the master is what we may call for convenience a 'vice principal,' for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This is a plain, sound, safe, and practicable line of distinction. We know where to find it and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based, upon the notion of grades in the service, or, what is much the same thing, distinct departments in the service (which 'departments' frequently exist only in the imagination of the judges, and not in fact), will breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a

Note.

labyrinth in which the judges that made it seem to be able to 'find no end; in wandering mazes lost.' * * * The real inquiry is, was the injury caused by another servant one of the ordinary risks of the particular employment. If so, the grade, whether higher, lower, co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow servants of whatever grade in the same employment."

UNITED STATES.

The advocates of the superior servant limitation will find no support for their side of the question in the decisions of the supreme court of the United States, or in those of the lower federal courts, except in the Ross case (112 U. S. 377); and decisions in which the influence of that case made itself felt. See *New England R. Co. v. Conroy* (U. S.), 16 Am. & Eng. R. Cas., N. S., 380 (here many of the leading cases are reviewed); *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 16 Sup. Ct. Rep. 40; *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269; *Gaynor v. Durkee* (C. C. A.), 87 Fed. 302; *Martin v. Atchison, T., etc., R. Co.*, 116 U. S. 399; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 4 Am. & Eng. R. Cas., N. S., 117; *Flippin v. Kimball* (C. C. A.), 11 Am. & Eng. R. Cas., N. S., 256; *Cleveland, C., C. & St. L. Ry. Co. v. Brown* (C. C. A.), 73 Fed. 970; *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 4 Am. & Eng. R. Cas., N. S., 188; *Deavers v. Spencer* (C. C. A.), 70 Fed. 480; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914.

Thus it is held that mere superiority of the negligent employee in position and in the power to give orders to subordinates is not a ground for liability of a railroad company for injuries to an employee caused by the negligence of another employee. *Northern Pac. R. Co. v. Peterson*, 162 U. S. 343, 16 Sup. Ct. Rep. 843.

In *Flippin v. Kimball* (C. C. A.), 11 Am. & Eng. R. Cas., N. S., 256, it is said in the opinion: "The general rule is well stated in a note to *Railway Co. v. Smith*, 8 C. C. A. 670 (S. C., 59 Fed. 993), quoting for its support many authorities: 'It makes no difference in the application of the rule exempting the master from liability for injuries to his servants for the acts of the coservants that the one receiving the injury is inferior in grade and subject to the orders of the one by whose negligence the injury is caused if both are engaged in the same general business, accomplishing one and the same general purpose.'"

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 54 Am. & Eng. R. Cas. 328, 13 Sup. Ct. Rep. 914, it is said in the opinion: "It may be safely said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability."

Foreman of Bridge Gang Having Power to Hire, Discharge and Control Hands.—A foreman of a railroad bridge gang, who is a subordinate of the superintendent of bridges, but has authority to hire and discharge the men under him, and also power to direct and control them in their work, is their fellow servant, with respect to injuries caused to one of them by his negligence in adopting and pursuing a dangerous method of doing a given piece of work, such as throwing down a shed, and the company is not liable therefor. So held in *Cleveland, C., C. & St. L. Ry. Co. v. Brown* (C. C. A.), 73 Fed. 970.

Foreman of Machine Shop with Mere Authority to Give Orders.—The foreman of a railroad machine shop, with authority to give orders to the men working in his department, is the fellow servant of one of the men, there being a master mechanic over both, with au-

Note

thority to hire and discharge. So held in *Gaynor v. Durkee* (C. C. A.), 87 Fed. 302.

Injury to Laborer—Negligence of Section Foreman in Running Hand Car at Excessive Speed.—A laborer employed under a section foreman on a portion of the track undergoing repairs, is a fellow servant of such foreman so as to exempt the railroad company from liability for injury to the former from the negligence of the foreman in running a hand car adequately supplied at a dangerous rate of speed. So held in *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 4 Am. & Eng. R. Cas., N. S., 128.

Section Hand Thrown from Hand Car—Negligence of Foreman in Applying Brakes.—In *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 4 Am. & Eng. R. Cas., N. S., 117, 16 Sup. Ct. Rep. 843, an action for injury to a member of a gang of laborers engaged in putting in repair sections of the railroad, alleged to have been caused by the negligence of the foreman of the gang, who had authority to hire and discharge such laborers, and exclusive charge of their direction and management in all matters connected with their employment, it is said in the opinion: "The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not of a mere separate piece of work in one of the branches of service in a department." * * * "He (such foreman) was in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but are nevertheless, fellow workmen." The accident was caused by the act of the foreman in suddenly stopping the car without warning, whereby plaintiff was thrown off.

Foreman of Gang Breaking Ore in a Mine—Allowing Ore to Run into Chute without Warning.—In *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, it is held that a foreman or boss of a particular gang of men, to which the plaintiff belonged, and with whom he worked in breaking ore in a mine, who drew the gate and permitted rock to run in a chute, without notifying the plaintiff, whereby he was injured, is neither a vice principal with, nor a representative of, the corporation defendant, but is a fellow servant with the plaintiff, for whose act the company was not responsible.

Track Foreman—Power to Discharge Subject to Supervisor's Approval—Bound to Follow Minute Directions as to Use of Track.—In *Deavers v. Spencer* (C. C. A.), 70 Fed. 480, it is held that a track foreman in the employ of a railroad, who, by the rules of the company, is required to report to the supervisor, and receive his instructions as to all his work; who can only suspend or discharge the men in his gang temporarily, and subject to the approval of the supervisor; who follows minute directions as to the use of the track in his work with the men forming the gang under his charge, is a fellow servant of the members of such gang, who assume the risk of injury by his negligence.

Doctrine of Baugh Case.—The rule announced by *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, and other more recent decisions of the supreme court of the United States, is, that where one is employed to superintend the entire business of the employer, or a distinct department thereof and given control over other employees working therein, he represents the employer; while one employed as a foreman to direct and manage the performance of some part of the general business, even with authority over his coemployees working

Note

therein, is not such a representative, and the employer is, consequently, not responsible for his carelessness.

In *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. Rep. 269, it is said in the opinion: "We held in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, that an engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, were fellow servants of the railroad company, hence that the fireman was precluded from recovering damages from the company for injuries caused, during the running by the negligence of the engineer. In that case it was declared that: *prima facie* all who enter into the employment of a single master are engaged in a common service, and are fellow servants. * * * All enter into the service of the same master to further his interests in the one enterprise. And while we in that case recognized that the heads of separate and distinct departments of a diversified business may, under certain circumstances, be considered, with respect to employees under them, vice principals or representatives of the master, as fully and completely as if the entire business of the master was by him placed under the charge of one superintendant, we declined to affirm that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master. It was further declared that the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it; each is equally with the other an ordinary risk of the employment, which the employee assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employees with fit and careful coworkers, and furnishing to such employees a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged negligent act than on the relations of the employees to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor."

Ross Case—Conductor of Train in Charge of Distinct Department.—A conductor of a railroad train, who has the right to command the movements of the train and to control the persons employed upon it, represents the company, while performing those duties, and does not bear the relation of fellow servant to the engineer and other employees of the company on the train. So held in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. The reason given for this holding is that the conductor, in relation to his train crew, is at the head of a distinct department of the master's business. However, the doctrine of this case is practically repudiated in *New England R. Co. v. Conroy* (U. S.), 16 Am. & Eng. R. Cas., N. S., 380.

Ross Case Followed.—The Ross case was followed by the lower federal courts until the doctrine there enunciated was practically repudiated by the supreme court of the United States. The following are a few of the offsprings of the Ross case: *Northern Pac. R. Co. v. Poirier*, 67 Fed. 881; *Canadian Pac. R. Co. v. Johnston*, 61 Fed. 738; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. 107; *McGrath v. Texas, etc., R. Co.*, 60 Fed. 555; *Northern Pac. R. Co. v. Smith*, 59 Fed. 993; *Harley v. Louisville, etc. R. Co.*, 57 Fed. 144; *Gravelle v. Minneapolis, etc., R. Co.*, 10 Fed. 711; *Union Pac. R. Co. v. Callaghan*, 56 Fed. 988; *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. 383; *Naylor v. New York*

Note

Cent., etc., R. Co., 33 Fed. 801; *Garrahy v. Kansas City, etc., R. Co.*, 25 Fed. 258; *Woods v. Lindvall*, 48 Fed. 62; *Borgman v. Omaha & St. L. Ry. Co.*, 41 Fed. 667; *Mason v. Edison Mach. Works (C. C.)*, 28 Fed. 228; *Northern P. R. Co. v. Peterson (C. C. A.)*, 51 Fed. 182.

Foreman of Construction Gang—Power to Hire, Discharge and Direct.—In *Woods v. Lindvall (C. C. A.)*, 48 Fed. 62, it is held that a foreman who is in charge of a gang of workmen engaged in construction work on a railroad, with full power to hire and discharge men and direct them when and where and how to work, is a vice principal, notwithstanding that he occasionally lends a hand in the actual manual labor. The foreman of a gang of twenty railroad laborers, who hires and discharges the men under him, keeps their time, and directs and controls their movements, is not their fellow servant. So held in *Cleveland, etc., Ry. Co. v. Brown (C. C. A.)*, 56 Fed. 804.

Foreman of Repair Shop in Charge of Wrecking Crew.—In *Borgman v. Omaha & St. L. Ry. Co. (Iowa)*, 41 Fed. 667, it is held that the foreman of a railroad repair shop, to whom is entrusted the task of restoring wrecking trains, with the assistance of a crew of men selected from the workmen in the shops and the section hands, and who has charge of all the men engaged in restoring the train, is when in charge of a wreck, a vice principal, for whose negligence the railroad company is liable to a workman injured while under his orders.

Train Dispatcher and Engineer—Authority to Direct and Control—Ohio Statute.—In *Baltimore & O. R. Co. v. Camp (C. C. A.)*, 65 Fed. 952, it is held that a train dispatcher, who has complete control of the movements of all trains on a division of a railroad, is not a fellow servant of the engineer of a train running on such division, either at common law, or under the statute of Ohio, providing that every person in the employ of a railroad company, actually having power or authority to direct or control another employee, is not a fellow servant, but a superior, of such other employee.

Ordered into Place of Unusual Danger.—Where the employer places one employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable, as the superior servant in giving the order stands in the place of the master. So held in *Thompson v. Chicago, M. & St. P. Ry. Co. (Minn.)*, 14 Fed. 564.

Order to Perform Act Outside Scope of Employment.—In *Gilmore v. Northern Pac. Ry. Co. (Ore.)*, 18 Fed. 866, it is held that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow servant, when the latter, having authority over the former, orders him to do an act, not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and is injured in doing so.

Power to Dismiss at Pleasure.—Where a master employs one servant and requires him to work under the orders of another, and gives the latter power to dismiss the former at his pleasure, the latter is a superior servant or vice principal and stands in the place of the master when acting in the scope of his powers. So held in *Miller v. Union Pac. Ry. Co. (Col.)*, 17 Fed. 67.

ALABAMA.

In this state it is held that, in absence of a statutory provision to the contrary, the common master is not liable for injury to a servant from the negligence of another, unless the negligence occurred in the performance or attempt to perform a nonassignable duty which the master owed to the injured servant. And the duty to merely direct and control servants in performing certain work is held to be one

Note

which he can delegate to a boss or foreman or other superior servant, so as to relieve himself of responsibility for negligence in discharging it. *Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245.

Rationale of Doctrine.—In *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672, it is said in the opinion: "The proposition which bases the liability on the superiority of grade of the negligent servant and the subordination to him of the injured servant, is in our judgment, not founded in adequate reason. It can make no difference whether he is injured by the carelessness of another brakeman in some remote part of the train, or of the engineer, or conductor; nor can it make any difference, whether a fireman is injured by the negligence of the engineer who directs him, or of the machinist who is charged with fitting the engine for the road. * * * The employer's obligation to his servant, in reference to his fellow servant, must be the same in all cases. * * * The master can do nothing more for the safety of himself or his family and property, than to be careful to select competent and fit servants. To inflict a penalty upon him for not doing more for his servant, is unreasonable. * * * After the employer has furnished competent and fit employees, the prevention of negligence on the part of any of them is certainly as much within the power of the others, as in that of the employer."

ALASKA.

In *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407, it is held that a mate of a ship, intrusted with the work of discharging the cargo upon a wharf, and having control and supervision of the ship's appliances for that purpose, the entire manner of using which was left to his judgment and discretion, is a vice principal of the defendant vessel owner. This, however, seems a misapplication of rule now sustained by the supreme court of the United States.

Foreman of Mine.—In *Alaska United Gold Min. Co. v. Muset*, 114 Fed. 66, 52 C. C. A. 14, it is held that where a corporation owning two mining plants has a general superintendent, with general oversight over both plants, and a foreman of each mine, who employs and discharges the men, and directs and controls the entire operations of his mine and of the various gangs of men there employed, such foreman is a vice principal, for whose acts and negligence in the conduct of the mine the owner is responsible.

ARIZONA.

The superior servant doctrine is not recognized in this jurisdiction. See *Southern Pac. Co. v. McGill* (Ariz.), 44 Pac. 302.

ARKANSAS.

Here a modification of the limitation seems to be established as a common-law rule. It is held that an employee, irrespective of his rank, who is charged with the duty to supervise work and the hands while they are performing the work, is the representative of the master, so as to render the latter liable for injury to one of the hands through the negligence of the superior servants in supervising or directing. See *Bloyd v. St. L., etc., Ry. Co.*, 58 Ark. 66, 22 S. W. 1089. But there are other decisions which do not seem reconcilable with this view. See *Fones v. Phillips*, 39 Ark. 17.

Foreman of Construction Gang—Inconsistent Orders.—In *Bloyd v. St. L., etc., Ry. Co.*, 58 Ark. 66, 22 S. W. 1089, it is held that the foreman of a gang of railroad workmen, whose charge extends to building and repairing many trestles and bridges, who has the power to employ and discharge the men, and whose duty it is to oversee and direct their work, is so far a vice principal of the railroad company that it will be responsible for his negligence in giving inconsistent orders to the men whereby one of them is injured. In this case it is said in the opinion: "Now, it is not the rank or title of the manager

Note

which made the company present in his person, but the authority with which he was clothed, and the duty of supervision he undertook to perform."

Foreman of Bridge Carpenters—Member of Gang Ordered to Dangerous Position.—In *Railway Co. v. Torrey*, 58 Ark. 217, 24 S. W. 244, it is held that if it be conceded that a foreman in charge of a gang of bridge carpenters, with authority to direct when and where they shall work, is a vice principal, it is error to charge that an employee can recover if he was negligently ordered by such foreman to a dangerous position, and, while in that position and by reason thereof, was injured, when he himself was exercising due care, the charge should state the facts which, if proved, would make the order negligent, and these facts must have been such as involve a failure to perform some duty which the company owes to the employee.

In *Fones v. Phillips*, 39 Ark. 17, it is held that whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of these duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere coservant, and the question is not whether the master reserved oversight and discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties to the servant injured.

Negligence of Foreman in Performing Manual Labor.—A master is not liable for an injury to a servant caused by the negligence of a foreman occupying the position of a vice principal, while performing an act of labor in common with the labors of the servant, unless his own negligence as master contributed with that of the foreman as a laborer to produce the injury. So held in *Railway Co. v. Torrey*, 58 Ark. 217, 24 S. W. 244.

CALIFORNIA.

The Civil Code of California went into effect Jan. 1, 1873, and under the head of "Obligations of the Employer," it provides as follows: "Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." And in *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360, 26 Pac. 175, it is said in the opinion: "This section of the Code not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow servant, but clears away to a great extent the difficulties which may have existed as to the meaning of 'fellow servants.'"

Application of Statute.—In *Donnelly v. S. F. Bridge Co.*, 117 Cal. 417, 49 Pac. 559, it is said in the opinion: "Where the injury has resulted from the omission or negligent performance of an act which it was no part of the duty of the master to perform, and in the doing of which no duty of the master was being performed, then the person through whose negligence the injury has resulted, whatever may be his grade or rank of employment, is not as to that act the representative of the master, and the responsibility for injury is upon the individual actor and not upon the employer."

An employee is not bound to indemnify an employee for damages he sustains in consequence of the negligence of a fellow servant employed by the same employer in the same general business; and the rule is not changed by the fact that the employee through whose negligence the injury was caused was the superior of the employee who was injured, in the service in which they were engaged. So held in *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255. See also,

Note

Noyus v. Wood, 102 Cal. 389, 36 Pac. 766; *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. 708; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378.

Superior Servant without Authority of Vice Principal.—A foreman conductor, or other superior servant who is not clothed with the authority of a vice principal, in whose favor the principal has abdicated his authority, is a fellow servant of an inferior employee, under the law applicable to the liability of a master for the negligence of his servants. So held in *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360, 26 Pac. 175.

Superintendent of Mine—With Power to Hire and Discharge—Negligence of Engineer.—In *Collier v. Steinhart*, 5 Cal. 116, it is held, in an action against the owners of a mine to recover damages for an injury sustained by an employee, that if the complaint avers that the injury was caused by the negligence or want of skill of the engineer, and that the superintendent had full power to control the working of the mine, and employed and discharged all the workmen, at his discretion, it must also allege that the defendants were also negligent in employing the superintendent, or it does not state a cause of action.

COLORADO.

Although the decisions of the supreme court of this state are somewhat confusing, we think it will be found upon close examination that the majority doctrine is held by the state authorities to be the correct interpretation of the common law. See *Denver & R. G. R. Co. v. Sipes*, 23 Colo. 227, 47 Pac. 287; *Colorado Mid. Ry. Co. v. Naylor*, 17 Colo. 501, 30 Pac. 249; *Deep Min. Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210.

In *Colorado Mid. Ry. Co. v. Naylor*, 17 Colo. 501, 30 Pac. 249, it is said in the opinion: "The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured, does not alone fix the master's liability. The general powers vested in the superior servant and the character of the specific act in connection with which this negligence occurs are considerations rarely, if ever, omitted in pursuing the inquiry. The accepted general rule is that where the negligent agent or servant can fairly be said to take the place of the master and represent him so as to become in reality a vice principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach."

Nonassignable Duties.—The duties which the law imposes upon the master with respect to the employee's safety are such as relate to the furnishing and keeping in repair reasonably safe machinery and appliances for carrying on his business, a reasonably safe place in which to render the service and the exercise of reasonable care in the selection of competent coworkers, such as pertain to the construction, and preservation and management, as distinguished from the work of operation. Where the master has properly performed these duties, the risk that the machinery and appliances will be properly operated by his coemployee is assumed by the servant. So held in *Denver & R. G. R. Co. v. Sipes*, 23 Colo. 227, 47 Pac. 287.

Vice Principal Acting against Objection of Injured Employee.—The master is liable for the acts of a vice principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, but not for such acts as relate to the common employment and are on a level with the acts of a fellow laborer, except those done by the vice principal against the reasonable objection of the injured servant. So held in *Deep Mining Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210.

Superintendent of Construction Work—Power to Hire and Discharge—Entire Control of Hands and Appliances.—But in *Denver, S. P. & P. R. Co. v. Discoll*, 12 Colo. 520, 21 Pac. 708, it is held that a superintendent of the work of extending a line of railroad, who has

Note

foreman and workmen under him, who he employs and discharges at pleasure, and who has entire control of the cars, tools, machinery and men employed, is not a fellow servant with the workmen, so as to preclude the latter from recovering damages against the railroad company for injuries resulting from the negligence of such superintendent.

Construction Work—Supervision and Direction of General Foreman—Authority to Hire and Discharge—Transporting to and from Work.—So where in the absence of the superintendent of construction the workmen employed in constructing a railroad are performing their labor under the supervision and direction of a general foreman, who has full power and authority to employ or discharge them, such foreman, in performing the duty of transporting the employees to and from work, was the representative of the railroad company and not their fellow servant. So held in *Colorado Mid. Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701.

Boy Ordered to Perform Perilous Act outside Scope of Employment by Foreman.—If a boy fourteen or fifteen years of age employed in nonhazardous service, is placed by his employer under the control of a foreman, and if such foreman orders him to perform an act in its nature perilous and which is outside the duties of the boy, but within the scope of the employment and duty of the foreman, and if in the attempt to obey such order the boy is killed, his employer is liable in damages. The fact that the boy would have been justified in disobeying the order will not exonerate his employer. So held in *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037.

CONNECTICUT.

Here the limitation has always been rejected. See *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094; *Sullivan v. New York, N. H. & H. R. Co.*, 62 Conn. 209, 25 Pac. 711.

One may in some of his acts be executing his master's duty toward the master's employee, while in other of his acts he is simply a fellow servant. The master's responsibility or nonresponsibility in case of injury is determined, not by the rank or grade of the negligent servant but by the character of the particular act or omission to which the injury is attributable. So held in *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094.

Foreman in Charge of Dynamite—Negligence in Preparing Cartridge—Explosion.—The foreman of a gang of railroad laborers was charged with the duty to take the oversight of and to handle dynamite cartridges used in blasting rock for the repair of the road. As foreman he received a higher compensation than the rest of the gang. In preparing a cartridge for use he negligently allowed it to explode, causing injury to one of the workmen. It was held there was nothing in the mere fact that he was foreman of the gang to prevent the relation of fellow servant existing between him and the injured employee. So held in *Sullivan v. New York, N. H. & H. R. Co.*, 62 Conn. 209, 25 Atl. 711.

DELAWARE.

Here the limitation has never been recognized as a common-law rule. See *Wheatley v. Philadelphia W. & B. R. Co.*, 1 Marv. (Del.), 305.

GEORGIA.

Although the decisions of the supreme court of this state on this question do not seem to be reconcilable, the later decisions are quite clear in rejecting the limitation. See *Cates v. Itner*, 104 Ga. 679, 30 S. E. 884; *Shepherd v. Southern Pine Co. of Ga.*, 118 Ga. 292, 45 S. E. 220; *Hamby v. Union Paper Mills Co.*, 110 Ga. 1, 35 S. E. 297.

Mere Authority to Direct Other Workman.—An employee engaged

Note

in the same job with other servants of his master and having direction of it is not a vice principal of the master, but stands on the footing of a mere fellow servant of such other employees. So held in *Cates v. Itner*, 104 Ga. 679, 30 S. E. 884.

In *Hamby v. Union Paper-Mills Co.*, 110 Ga. 1, 35 S. E. 297, it is held that two persons subject to control and direction by the same general master in the same common object are fellow servants, and if one is injured by the negligence of the other, the master, save when by statute otherwise provided, is not liable, although the negligent servant had the right to direct the work of the other.

And in *Shepherd v. Southern Pine Co. of Ga.*, 118 Ga. 292, 45 S. E. 220, it is held that "a workman engaged in the same job with others and having direction of it is not a vice principal of the master, but stands on the footing of a mere fellow servant."

Hand Directing Work Not General Superintendent.—A workman engaged in the same job with two or three others, and having the direction of it, is not a general superintendent of a corporation, so as to bind it as such, but stands on the footing of a mere fellow servant. So held in *McDonald v. Eagle & Phenix Mfg. Co.*, 68 Ga. 839.

Incompetent Employee Assigned to Task Created by Emergency—Power to Hire and Discharge.—But where the master performs the duty imposed by law of employing competent servants, and a fellow servant of the plaintiff, without the master's knowledge or authority, selects from the competent servants thus employed one who is unsuited for the special task created by an emergency, and transfers him from work he can do to work he cannot do, the act of thus assigning him is not that of a fellow servant. But if the person making the assignment to the new duty was authorized to employ and discharge, and to make such assignment to meet the emergency, and if he knew of the incompetency of the servant to perform the new task, his negligence would be treated as the negligence of the master. So held in *Hilton & Dodge Lumber Co. v. Ingram*, 119 Ga. 652, 46 S. E. 895.

Authority to Assign to Duties Not within Scope of Special Duties.—So in *Blackman v. Thomson-Houston Elec. Co. of Augusta*, 102 Ga. 64, 29 S. E. 120, it is held that one who is employed in the capacity of engineer for a manufacturing company, but who is likewise under a duty to obey generally the orders of a person who is placed in authority over him, and who has power temporarily to withdraw him from the performance of the special duty for which he was employed, and to assign him to the performance of other and inconsistent duties not connected with or embraced within his special employment, is not a fellow servant with such superior.

Fall of Scaffold—Defective Plan—Negligence of Agent Having General Control of Working Plant.—And in *Blackman v. Thomson-Houston Elec. Co. of Augusta*, 102 Ga. 64, 29 S. E. 120, it is held that if, in the prosecution of the business of a corporation, an agent having a general control of its working plant causes a scaffold to be constructed by other employees under his direction, for the purpose of removing heavy machinery, and after its completion temporarily withdraws an engineer from the special duties for which he was employed, and directs him to assist in the removal of such machinery, using for that purpose the scaffold so constructed, and because of some imperfection therein resulting from a defect in the plan of its construction, such defect being unknown to the engineer, such scaffold falls and injures the engineer, he is entitled to recover.

Construction of Ship—Carpenter Acting as Foreman's Intermediary in Signalling to Hoist or Lower Timbers.—And where the foreman of a ship yard in charge of the construction of a vessel was compelled by reason of the location and distance of the winch used in raising timbers, to employ an intermediary for the purpose of signalling the men in charge of the winch, in respect to paying out or taking in the rope for the purpose of hoisting or lowering timbers, the fact that such intermediary was a ship carpenter, taken from his work and

Note

used to transmit the foreman's signals, would not prevent him, for the time being, while discharging that duty, from being a vice principal; and injuries resulting to another ship carpenter on account of his negligence, while in the performance of a duty devolving upon the master, would not be chargeable to the act of a fellow servant.

Ross Case Followed.—In this jurisdiction, as in many others, the Ross case created great confusion until that decision was practically overruled by the United States supreme court.

In *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 27 S. E. 768, it is held that an employee of a corporation who, in the discharge of his general duties, has charge of a particular branch or department of the corporation's business, as to which he acts in the capacity of a vice principal, and as such employs and has control of all the subordinate servants who are to work under him, is, as to one of these whose duty it is to obey his orders and who takes his orders from no other source, a quasi master, and not a fellow servant in the sense that the subordinate will have no right of action against the corporation for personal injuries caused without fault on his part by the negligence of such superior. But here the court seems to merely adopt the doctrine of the Ross case (112 U. S. 377).

And in this case, it is also said in the opinion: "It was alleged that the plaintiff was a subordinate employee under the direction and control of the engineer, and that it was his duty to obey the orders of the engineer. The declaration alleges that he was employed by the engineer. These allegations being admitted by the demurrer to be true, the engineer, while a coemployee, was not a fellow servant with plaintiff. The master had deputed to the engineer authority over those who were subordinate to him, and the negligence of the person exercising such authority was the negligence of the master itself. See *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184."

Conductor Not Fellow Servant of His Trainmen.—In *Spencer v. Brooks*, 97 Ga. 681, 25 S. E. 480, it is held that, as a general rule, a conductor in charge of a train, and having full control of its movements, is not, while in the performance of his usual and ordinary duties with reference thereto, a fellow servant of an engineer, fireman or brakeman working under his orders. Under such circumstances the conductor is the vice principal of the railroad company. In this case it appeared that the conductor was in fact directing and controlling the movements of the train, and that the plaintiff, a brakeman, was acting under his orders at the time of the injury.

In *Spencer v. Brooks*, 97 Ga. 681, 25 S. E. 480, it is said in the opinion. Ordinarily the conductor of a train has control of its movements, and brakemen connected with the train are, while engaged in coupling cars to the train at stations, subject to his orders and under his control, and he is not, when directing the movements of the train and giving orders to the brakeman and the engineer in connection therewith a fellow servant of such employees, within the meaning of the rule as to fellow servants, but is a vice principal of the master. See *Mills v. East Tenn., etc., Ry. Co.*, 87 Ga. 105, 13 S. E. 205; *Prather v. Richmond & Danville R. Co.*, 80 Ga. 436, 9 S. E. 530, and cases cited."

Mills v. East Tenn. Ry. Co., 87 Ga. 102, 13 S. E. 205, is also in line with *Railroad Co. v. Ross*, 112 U. S. 390, 5 Sup. Ct. Rep. 184, which it quotes with approval. In referring to the doctrine of the Ross case, the courts says in its opinion: "This doctrine has also been recognized by the court in *Prather v. R. & D. R. R. Co.*, 80 Ga. 436, 9 S. E. 530, wherein justice Simmons remarked: 'The conductor was in charge of the train * * *. He represented the company. It was his right and duty to give all necessary orders for the protection of the interests of the company and the safety of its servants.' Other authorities could be cited, but these are doubtless sufficient to support a proposition so well founded in common sense and experience."

Note

IDAHO.

In this jurisdiction we have been able to discover only one decision on this question. In *Palmer v. Utah & N. Ry. Co.*, 2 Idaho 290, 13 Pac. 425, it is held that a railroad corporation is liable for damages to their employees injured through the negligence of their agents or servants who are invested with a controlling and superior duty in the management of the business of the corporation. In this case it was said in the opinion that the court was controlled by *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

ILLINOIS.

In this state the rule is that to render the master liable for injury to one of his employees, which resulted from the negligence of a fellow servant having authority over him, the negligent act must have been done in exercising such authority. *Chicago, Rock Island & Pac. Ry. Co. v. Touhy*, 26 Ill. App. 99; *Chicago, Burlington & Q. R. Co. v. Blank*, 24 Ill. App. 438; *Chicago & A. R. Co. v. May*, 108 Ill. 288, 15 Am. & Eng. R. Cas. 320; *Railroad Co. v. Beckstein*, 173 Ill. 187, 50 N. E. 711; *Fitzgerald v. Honkomp*, 44 Ill. App. 365; *Fraser & Chalmers v. Schroeder*, 163 Ill. 459, 45 N. E. 288; *Illinois Cent. R. Co. v. Atwell (Ill.)*, 6 R. R. R. 317, 29 Am. & Eng. R. Cas., N. S., 317, 64 N. E. 1095; *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Chicago Dredging & Dock Co. v. McMahon*, 30 Ill. App. 358; *Clay v. Chicago, B. & Q. R. Co.*, 56 Ill. App. 235; *Consolidated Coal Co. v. Wombacher*, 31 Ill. App. 282; *Kellyville Coal Co. v. Humble*, 87 Ill. App. 437; *Leiter v. Kinnare*, 68 Ill. App. 558; *Lincoln Coal Mining Co. v. McNally*, 15 Ill. App. 181; *Mobile & O. R. Co. v. Massey*, 52 Ill. App. 556; *Talcott v. Grant Wire & Spring Co.*, 33 Ill. App. 155; *Wabash, St. Louis & Pac. Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946; *West Chicago St. R. R. Co. v. Dwyer*, 57 Ill. App. 441.

The fact that one of several servants, in the habit of working together and in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not render the master liable for his negligence resulting in an injury to one of the others, unless the negligence complained of arises out of and is the direct result of the exercise of such authority. So held in *Chicago, Rock Island & Pac. Ry. Co. v. Touhy*, 26 Ill. App. 99.

Negligence of Foreman Acting as Colaborer.—A master is liable for an accident which happens in consequence of an improper and inconsiderate order, such as no one exercising ordinary care would have given, when such order is given by a foreman or superintendent having authority not only to give orders as to work, but to discharge the person to whom it is given; but if an accident happens from some negligence of the foreman which related to the foreman's duties as a colaborer with the person injured and which might just as readily have happened with one having no such authority, the matter is not liable. So held in *Fitzgerald v. Honkomp*, 44 Ill. App. 365.

In *Chicago & A. R. Co. v. May*, 108 Ill. 288, 15 Am. & Eng. R. Cas. 326, it is held that the mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. If the negligence complained of consists of some act done or omitted by the servant having such authority, which relates to his duty as a colaborer with those under his control, and which might as readily happen with no such authority, the common master will

Note

not be liable. But where the negligent act arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his colaborers, the master will be liable. In such case the governing servant is not the fellow servant of those under his charge with respect to the exercise of such powers.

"Dual Capacity Doctrine" of Illinois—Status of Foreman Causing Injury to Employee under Him.—The "Dual capacity doctrine," applied in Illinois in determining the liability of a master for injury to his servant, is: The mere fact that a master has a foreman over the injured servant does not make the master responsible for the foreman's negligence, nor does the mere fact that the foreman is sometimes or generally, also a colaborer, excuse the master for his negligence; but every case must depend on its circumstances, and if the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a colaborer with those under his control, and which might just as readily have happened with one of them, having no such authority, the common master will not be liable; but when the negligent act complained of arises out of and is the direct result of the authority conferred on him by the master over his colaborers, the master is liable. See *Railroad Co. v. Beckstein*, 173 Ill. 187, 50 N. E. 711; *Railroad Co. v. May*, 108 Ill. 298.

Engineer and Fireman.—An engineer and fireman on a railroad train are fellow servants, when in the discharge of their ordinary duties, although the engineer is the superior servant. So held in *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611.

Car Starter and Gripman—Order to Move Car—Question for Jury.—It is a question of fact for the jury whether or not a "starter" ordering the moving of a cable car was a fellow servant with the gripman of such car, and acting as such, or stood in the relation of the representative of the common master, with authority to command such gripman. So held in *West Chicago St. R. Co. v. Dwyer*, 162 Ill. 482, 44 N. E. 815.

Master Liable Where Negligence Is the Result of Exercise of Authority over Subordinate Employees—Power to Hire, Discharge and Direct.—A servant of a railroad company, to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is as to such servants whom he so hires, discharges and controls, the representative of the master when exercising such power or control, and is not a fellow servant; nor is he in the same line of employment as the servant he so controls. So held in *Chicago & A. R. Co. v. May*, 108 Ill. 288.

Charge and Control of Gang Engaged in Particular Service.—An employee of a railroad company having charge and control of a crew or gang of men engaged in a particular service, who are bound to obey his orders, is not a fellow servant with such persons, in the same line of employment, within the meaning of the rule that prevents a recovery by a servant, of his master, for the negligence of a fellow servant; and the commands of such employee, within the scope of his authority, are to be regarded as those of the master. So held in *Wabash, St. L. & Pac. Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253.

Control of Workmen in Carrying on Particular Branch of Business.—In *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946, it is held that where a master confers authority upon one of his employees to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of the business is the direct representative of the master, and not a mere fellow servant; all commands given by him within the scope of his authority are, in law, the commands of the master; and if he is guilty of a negligent and un-

Note

skillful exercise of his power and authority over the men under his charge the master must be held to answer.

Control of Gang Carrying on Distinct Branch of Business—Existence of Immediate Superior Immaterial.—In *Chicago & A. R. Co. v. May*, 108 Ill. 293, it is said in the opinion: "Where a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him, within the scope of his authority, are in law, the commands of the company; and the fact that he may have an immediate superior standing between him and the company makes no difference in this respect. * * * * When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences."

Temporary Authority over Servants Engaged in Certain Work.—In *Fraser & Chalmers v. Schroeder*, 163 Ill. 459, 45 N. E. 288, it is held that an employee upon whom the master confers temporary but full authority over other servants in certain work, is with respect thereto, the direct representative of the master, and for his negligent or unskillful exercise of such authority the master is liable.

Negligent Order.—Where an employee who has control over other servants of the same master, with power to hire and discharge them, gives a negligent order to one of such servants, who, in obeying, causes injury to another of them, the master is liable for the damages. So held in *Chicago, Burlington & Q. R. Co. v. Blank*, 24 Ill. App. 438.

Death of Section Hand—Negligence of Foreman—Improper Order.—In *Illinois Cent. R. Co. v. Atwell* (Ill.), 6 R. R. R. 317, 29 Am. & Eng. R. Cas., N. S., 317, 64 N. E. 1095, it is held that where the death of a railroad section hand was due to the attempt to obey an improper order of the foreman, his administrator might recover, the foreman not being a fellow servant with regard to the exercise of his power to command.

Charge of Wrecking Crew—Propping Car Floor on Track—Negligent Directions.—Where one in charge of a wrecking train and crew of men, in removing the floor of a car from the track, directed his men, in a grossly negligent manner, to lift it up and place sticks under the same, and then let go the same, whereby it, through such negligent management, fell upon and injured one of the men under his direction, it was held that the master was liable to the injured employee. *Wabash, St. Louis & Pac. Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253.

Agent with General Power to Employ, Discharge, Direct and Control—Hand Ordered to Work in Dangerous Place.—Where an agent of a corporation having general power to employ and discharge employees and to direct and control them, directed one to work in a dangerous place, and the latter protested that it was dangerous to work in such place, but was assured by the agent that there was no danger, and the agent had superior means of knowing the condition of the place as to safety, it was held that the servant had the right to assume that the agent had not misrepresented the probability of danger, and when the servant is not a fellow servant with the agent, and is injured while working in such place, the servant injured may recover from the master for the injury he has sustained. So held in *Chicago-Anderson Pressed Brick Co. v. Sobkowick*, 148 Ill. 575, 36 N. E. 572.

Death of Car Wiper—Collision—Negligence of Foreman with Authority to Decide Which Cars Should Be Placed on Cleaning Track.—The case of *Railroad Company v. Skola*, 183 Ill. 454, 56 N. E. 171,

Note

seems to stand in a class by itself. There the foreman ordered the deceased to go under a car and wipe the motors, while he was so engaged, the foreman himself went to some cars that stood on the main track, and that needed cleaning, and put one of the cars in motion to bring it down the track on which stood the car under which the deceased was working. The car moved at a high rate of speed, the foreman was unable to stop it, it collided with the car under which deceased was working, and he was killed. It was held that the master was liable because the foreman had the power, as foreman, to decide what cars should be brought from the main track to the cleaning track, and where placed; and that, under such circumstances, the foreman acted as a vice principal, and not as a colaborer.

Conductor of Construction Train—Power to Hire, Discharge and Command—Train Dispatcher's Order Misread—Collision.—A conductor of a construction train, with workmen under him subject to his orders, and whom he employed and discharged at his pleasure, being at work upon the track with his train, received from the train dispatcher a notice of an approaching train, and an order to protect it. He misread the order and so got the impression that the train was coming from the opposite direction from which it really was coming. Having completed his work at the point where he was, he ordered his men on board and started, as he supposed, ahead of the train he was to protect, and a collision was the result. It was held that the company was liable for injuries sustained by laborers on the construction train by reason of the collision. *Mobile & O. R. Co. v. Massey*, 52 Ill. App. 556.

INDIANA.

The limitation has never been adopted in this jurisdiction. See *Brazil & Chicago Coal Co. v. Cain*, 98 Ind. 282; *Capper v. Louisville E. & St. Louis Ry. Co.*, 103 Ind. 305, 2 N. E. 749; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Pittsburg, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Robertson v. Chicago & E. R. Co.*, 146 Ind. 486, 45 N. E. 655; *New Pittsburg, etc., Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181, 29 N. E. 915; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Indiana, etc., R. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Thacker v. Chicago, etc., Ry. Co. (Ind.)*, 4 R. R. R. 773, 27 Am. & Eng. R. Cas., N. S., 773; *Indianapolis & St. Louis Ry. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200; *Belt Ry. Co. v. Brown*, 142 Ind. 659, 42 N. E. 359; *Nall v. Louisville, etc., Ry. Co.*, 129 Ind. 260, 28 N. E. 183, 611.

Power to Control, Direct or Discharge Not the Test.—In *Robertson v. Chicago & Erie R. Co.*, 146 Ind. 486, it is said in the opinion: "The rule in this state, now firmly settled, is that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or a vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant. *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Spencer v. Ohio, etc., R. W. Co.*, 130 Ind. 181, 29 N. E. 915; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Indiana, etc., R. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Brazil, etc., Co. v. Cain*, 98 Ind. 282."

Mere Inferiority in Grade.—In the absence of express contract to that effect, the master is not liable for injuries suffered by one of his employees solely through the negligence of another of his employees, engaged in the same general business. Nor is the master rendered liable by the fact that the injured employee is inferior, in grade of

Note

employment, to the one through whose negligence the injury is caused, if the services of each in his particular sphere, are directed to the accomplishment of the same general end. So held in *Brazil & Chicago Coal Co. v. Cain*, 98 Ind. 282.

Distinction between Vice Principal and Superior Servant.—In *Thacker v. Chicago, etc., Ry. Co. (Ind.)*, 4 R. R. R. 773, 27 Am. & Eng. R. Cas., N. S., 773, 64 N. E. 605, it is said in the opinion: "In this state there is a clear distinction between a superior servant and a vice principal. A superior servant is generally one who has authority to direct and control other servants, and may or may not be charged with any of the duties which the master owes his servants. Whether or not one is a vice principal does not in any way depend upon his rank."

Loading Railroad Iron on Flat Cars.—In *Indianapolis & St. Louis Ry. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200, it is said in the opinion: "Courts know judicially that loading railroad iron on flat cars pertains to the service of an employee, and when it is averred that one servant was injured in consequence of the negligent manner in which such loading was performed by the defendant, the presumption arises that such injury was the result of the negligence of a fellow servant. This is so because railroad corporations must of necessity employ servants to load its cars. To say the servant who loaded the car was also the chief agent and officer of the railroad company, without more, would in no manner change the situation. Regardless of his agency or office in other respects, if he was also properly engaged in loading cars, he was at that time a fellow servant with all others in like service."

Construction of Bridge—Negligence in Placing Wedges.—In *Belt Ry. Co. v. Brown*, 142 Ind. 659, 42 N. E. 359, it appeared that plaintiff, an employee of the defendant company was injured, while engaged in building a railway bridge, by reason of the slipping of wedges used in the construction of the track. And it is said in the opinion: "But it is said that the foreman was a vice principal and neglected to keep the wedges in place. There is no vice principal where the duty owing is not one devolving upon the master. *New Pittsburg Coal, etc. v. Peterson*, 136 Ind. 398, 35 N. E. 7, and authorities cited. We have already determined that the duty neglected was not one resting upon the master. It did not arise from an obligation to supply a safe place or safe appliances. The rule may be broadly stated that the master is never liable for failing to supply a safe place to work when the work consists in making safe the place and the condition of which he complains."

Foreman Fellow Servant of Those under His Supervision.—A foreman, or other like agent, except where the master's duties are delegated to him, is a fellow servant with those under his immediate supervision, and for his negligence the master is not liable to a servant engaged in the same general service. So held in *Capper v. Louisville E. & St. Louis Ry. Co.*, 103 Ind. 305, 2 N. E. 749.

Saving Threatened Bridge—Control of Hands Called from Different Departments—Choosing Work, Place and Appliances.—Whether in a given case one is acting as the representative of the master, or merely as a coemployee with others employed by the same master, depends upon the character of the duties imposed upon him and which he is performing at the time, and not upon his rank or title, and where an employee of a railroad company, entrusted with the duty of saving a bridge whose destruction is threatened by a freshet, in pursuance of the authority conferred upon him, calls out the employees from the various departments of the railroad company's service to unite in saving the bridge, chooses the place where they should work, and directs what appliances they should use, he is not a fellow servant with those under his control. So held in *Nail v. Louisville, N. A. & C. Ry. Co.*, 129 Ind. 260, 28 N. E. 183, 611.

Note

Failure to Define Duty and Authority with Respect to Each Other.—In *Atlas Engine Works v. Randall*, 100 Ind. 293, it is held that if the master subjects the servant to the commands of another, without information or caution with respect to such obligations as the master owes, the other stands in the master's place, notwithstanding the two servants are, as regards the common employment, fellow servants. But the rule is otherwise if he defines the duty and authority of each with respect to the other, or gives instructions covering the subject of their employment, so as to give no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding it.

Section Foreman—Dual Capacity—Employing and Discharging—Control of Hands.—A section foreman vested with authority to employ and discharge section hands, is a vice principal when employing and discharging servants; but he is a fellow servant in his control of the men after their employment; and for an injury to a member of his gang, occasioned by such foreman's negligence, the railroad company is not liable. So held in *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303.

In Charge of Distinct Department.—In *Taylor v. Evansville & T. H. R. Co.*, 121 Ind. 124, 22 N. E. 876, it is said in the opinion: "We do not affirm that an employee, with authority to command, may not be a fellow servant; on the contrary, we hold that one having authority to command may still be a fellow servant, but we hold, also, that where the position is such as to invest the employee with sole charge of a branch or department of the employer's business, the employee, as to that branch or department, may be deemed a vice principal while engaged in giving orders or directing their execution.

Master Mechanic in Sole Charge of Shop—Exercise of Power to Command.—In *Nall v. Louisville, N. A. & C. Ry. Co.*, 129 Ind. 260, 28 N. E. 183, it is said in the opinion: "The recent case of *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124, 22 N. E. 876, may be said to mark another and very important modification of the doctrine of *Columbus, etc., R. W. Co. v. Arnold*, supra (31 Ind. 174). In the opinion in that case the following language is used: 'Our opinion is that, at the time appellant was injured, Torrence, the master mechanic, was performing the master's duty, and not merely the duty of a fellow servant. He was in control of the shop where the appellant was working; he was the only representative of the master at the place; men, machinery, and work were under his control. He gave the orders which it was the duty of those under him to obey, and he alone could give orders as the master's representative. He gave the specific order under which the appellant acted. He did not join the appellant as a fellow servant in doing the work, but he commanded it to be done. He was in the position of one exercising authority, and not in that of one engaged in common with another in the same line of service. It is not easy to conceive how it can be justly asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distinct department by virtue of the power delegated to him by the master, is no more than a fellow servant, for in the absence of the master, the command of an agent entitled to obedience, must be that of the master conveyed through the medium of the agent. Nor can it be held without infringing the principles of natural justice, that if he who is authorized to give the command makes its execution unsafe, the employee, whose duty it is to obey, has no remedy for an injury received while doing what he was commanded to do.' This is decisive of the case at bar."

IOWA.

Here the decisions of the supreme court are without conflict on this question, and the minority doctrine is distinctly rejected. See *Fosburg v. Philipps Fuel Co.*, 93 Iowa 54, 61 N. W. 400; *Hathaway v.*

Note

Illinois Cent. Ry. Co., 92 Iowa 337, 60 N. W. 651; *Peterson v. Whitebreast Coal & Min. Co.*, 50 Iowa 673; *Wilson v. Dunreath Red-Stone Quarry Co.*, 77 Iowa 429, 42 N. W. 360; *Newbury v. Getchel & Martin Lumber & Mfg. Co.*, 100 Iowa 441, 69 N. W. 743; *Geesen v. Saguin*, 115 Iowa 7; *Foley v. Chicago, etc., Ry. Co.*, 64 Iowa 644, 21 N. W. 124; *Baldwin v. St. Louis, etc., Ry. Co.*, 68 Iowa 37, 25 N. W. 918; *Barnwell v. Connor*, 110 Iowa 238; *McQueeney v. Chicago, etc., Ry. Co. (Iowa)*, 94 N. W. 1124; *Scott v. Chicago Great Western Ry. Co.*, 113 Iowa 381; *Brewster v. Chicago & N. W. Ry. Co.*, 114 Iowa 144.

Nonassignable Duties.—In *Newbury v. Getchel & Martin Lumber & Mfg. Co.*, 100 Iowa 441, 69 N. W. 743, it is said in the opinion: "We have frequently held that the mere fact that one employee has authority over others, does not make him a vice principal or superior, so as to charge the master, with his negligence. *Peterson v. Mining Co.*, 50 Iowa 673; *Foley v. Railway Co.*, 64 Iowa 650, 21 N. W. 124; *Benn v. Null*, 65 Iowa 407, 21 N. W. 700; *Baldwin v. Railroad Co.*, 68 Iowa 37, 25 N. W. 918; *Hathaway v. Railway Co.*, 92 Iowa 337, 60 N. W. 651. This rule, of course, relates to the negligence of the foreman, as such, and not to his want of care in doing those things which the master is obliged to perform by virtue of the relation existing between him and his servant. The rule is well settled, although not always correctly applied, that the liability of the master is made to depend upon the character of the act, in the performance of which the injury occurs, and not upon the rank of the employee who performs it. If it is one pertaining to a duty the master owes to his servants, he is responsible to them for the manner of its performance. But, if the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master is not liable to a fellow servant for its improper performance. For instance, it is the duty of the master to make reasonable efforts to supply his employees with safe and suitable machinery, tools, and appliances, and thereafter to make like efforts to keep the same in repair, and in a safe, serviceable condition. He is also required to exercise reasonable care in selecting and retaining a sufficient number of competent servants to properly carry on the business in which the servant is employed. It is another duty to make and publish such rules and regulations as are reasonably necessary to protect his employees against injury incident to the performance of their duties. And it is the further duty of the master who knowingly employs youthful, or inexperienced servants, and subjects them to the control of others, to see that they are not employed in a more hazardous position than that for which they were employed, and to give them such warning of their danger as their youth and inexperience demand. These are duties of which master cannot relieve himself by showing that he delegated their performance to another servant who was at fault in performing them. In the performance of his duties the servant, agent, or employee stands in the place of the master, and becomes a vice principal, and the master is responsible for his negligence.

Mere Authority over Other Employees.—The mere fact that one employee had authority over others, did not make him a vice principal, or superior, so as to charge the master with his negligence, in a matter which it was not the employee's duty to attend to. So held in *Newbury v. Getchel & Martin Lumber & Mfg. Co.*, 100 Iowa 441, 69 N. W. 743.

Injury to Car Repairer—Negligence of Foreman with Mere Authority to Direct.—Where the negligence causing injury was to a car repairer, whose duty was to repair cars on the track, was that of the foreman of the force with which the former was connected, but the foreman had no authority over his men, except to direct them about their work, it was held that such foreman was the fellow servant of the men under him, and not a vice principal of the company. *Foley v. Chicago, Rock Island & Pac. Ry. Co.*, 64 Iowa 644, 21 N. W. 124.

Note

Foreman Engaged in Manual Labor.—In *Baldwin v. St. Louis, K. & N. Ry. Co.*, 68 Iowa 37, 25 N. W. 918, it was held that it may be conceded that a mere foreman, as the word "foreman" is generally understood, that is as a laborer with power to superintend the labor of those working with him, is a coemployee so far as his own mere labor is concerned, for whose negligence in that capacity, resulting in injury to a coemployee, the master is not liable.

Only Responsible for Vice Principal's Performance of Master's Personal Duties.—In *Scott v. Chicago Great Western Ry. Co.*, 113 Iowa 381, it is held that the master is liable for the negligence of a vice principal only when the latter is engaged in the performance of some of the employer's personal duties.

Injury to Brakeman—Negligence of Engineer in Stopping Train.—In *Brewster v. Chicago & N. W. Ry. Co.*, 114 Iowa 144, an action against the railroad company for an injury to a brakeman by being thrown from a car by the engineer negligently and suddenly stopping the train, it was held that there could be no recovery under the common law, since the negligence was that of the brakeman's fellow servant.

Foreman Supporting Column as Injured Employees Substitute.—In *Barnicle v. Connor*, 110 Iowa 238, it appeared that a foreman was directing plaintiff, an employee, in the moving of a column and told him to let go of it, and do something else, the foreman taking his place, and that as plaintiff turned to leave, the column rolled and struck him. It was held that as the act causing plaintiff's injury, the foreman was a fellow servant, and, therefore there could be no recovery against the master. In this case it is said in the opinion: "Whatever may have been the extent of Wells's (the foreman's) power and control over the men at work on this building, it is clear that the act alleged to be negligent was the act of a fellow servant, and not that of a vice principal. Wells was at the time attempting to hold the column that plaintiff had a moment before left. He was performing the identical work that plaintiff had been doing,—work which might have been done by a servant of the lowest rank. It is the work of a servant and did not pertain in any way to any personal duty the defendants owed to the plaintiff as their employee. Such being the case, it is well settled that no liability attached to the principal."

Foreman Assisting in Replacing Chain on Pulley.—In *McQueeny v. Chicago, etc., Ry. Co.* (Iowa), 94 N. W. 1124, it is held that a foreman in charge of a steam shovel, while assisting in replacing a chain on a pulley of the shovel, is a fellow servant of a laborer under him who is also engaged in replacing the chain.

Use of Unsafe Tool Suggested by Foreman.—In *McQueeny v. Chicago, M. & St. P. Ry. Co.* (Iowa), 94 N. W. 1124, it is said in the opinion: "There has been some conflict in the authorities as to the liability of an employer for the negligent acts of the foreman working with other employees in the prosecution of the work in which they are all engaged, but the rule which has the support of the great weight of authority in that the liability of the employer for the negligent act of the foreman does not depend on differences of rank between the foreman and the other employees, but upon the nature of the act itself, as to whether it is one in connection with which the foreman is engaged with the other employees in prosecuting a common undertaking. If he is in fact a coemployee as to the thing done, which is something that might have been done by another employee, then difference in rank is immaterial, and the general rule as to coemployees is applicable. In the application of this rule it has been held that where safe tools and appliances have been provided, the use of an unsafe tool or appliance at the suggestion of the foreman will not render the employer liable. *Maher v. Thropp*, 59 N. J. Law 186, 35 Atl. 1057; *Cleveland, C., C. & St. L. R. Co. v. Brown*, 20 C. C. A. 147, 73 Fed. 970."

Note

In Charge of Timber Yard—Authority to Hire and Discharge.—One who has charge of the timber yard of a railroad company, and employs and discharges men, is a vice principal; and for his negligence, resulting in personal injury to one of his subordinates, the common master is liable. So held in *Baldwin v. St. Louis, K. & N. W. Ry. Co.*, 75 Iowa 297, 39 N. W. 507.

When Acts of Foreman Merely Acts of Fellow Servant.—In *Geesen v. Saguin*, 115 Iowa 7, it is said in the opinion: "It is well settled that the acts of a foreman will be only acts of a coemployee, where no duty as vice principal devolves upon him. *Newbury v. Manufacturing Co.*, 100 Iowa 441, 448, 69 N. W. 743; *Barnicle v. Connor*, 110 Iowa 238; *Scott v. Railroad Co.*, 113 Iowa 381; *Northern Pac. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40 L. Ed. 994; *Cleveland, etc., Railroad Co. v. Brown*, 20 C. C. A. 147, 73 Fed. 970; *Balch v. Haas*, 20 C. C. A. 151, 73 Fed. 974; *McGinty v. Reservoir Co.*, 155 Mass. 183, 29 N. E. 510."

KANSAS.

Here it seems the accepted doctrine is that the master is responsible for the negligent exercise of the superior servant's authority over those under his control. See *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 444; *Missouri Pac. Ry. Co. v. Peregoy*, 36 Kan. 424, 14 Pac. 7; *Consolidated Kansas City Smelting & Refining Co. v. Peterson* (Kan. App.), 55 Pac. 673.

In *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 444, it is said in the opinion: "Where the general power to manage and command is given to one, and the duty of the others is merely to execute and obey, he who directs stands in the place of the principal, and the principal must respond to those under him for his misconduct. This must be so, else it is impossible to see how at common law a railroad corporation can even be responsible to any of its employees for the misconduct of any officer occupying a superior station in the same line of service; for all are servants, and the master is only an intangible entity. * * * It may be that a mere matter of difference in the grade of service of the employees is not controlling, but where one is under the direct and personal supervision and control of the other it does control."

In *Mo. Pac. Ry. Co. v. Peregoy*, 36 Kan. 424, 14 Pac. 7, it is said in the opinion: "We concede the general rule to be that negligence of a fellow servant is one of the risks assumed by the employee, and for which the employee is not liable; but there are exceptions to this rule, and where the employer places an employee under the control and direction of another, and the latter, in the exercise of the authority conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the master is liable."

Conductor and Brakeman—Authority to Command.—At common law, a conductor having full charge and control of a train of cars is not a fellow servant with a brakeman who acts under his orders. In such case the conductor is the representative of the principal, and the latter is responsible to the brakeman for the conductor's negligence. So held in *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 444.

Foreman of Car Repairers—Injury to Hand under Car—Negligence in Moving Other Cars without Warning.—In *Hannibal & St. Joseph R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320, it appeared that a foreman or boss car repairer of a railroad company was put in charge of three subordinate car repairers whose duty it was to repair cars while standing on the track in the yard of the company in which trains were to be made up. The company left everything covering the work of repairing the cars, the control of the subordinate employees, and their protection while engaged in their work, to such foreman or boss repairer. The foreman directed a car to be set on the track at a particular place for the purpose of being repaired; he

Note

then ordered two of his subordinates to go under the car for the purpose of repairing it; these employees took with them the tools necessary to make the repairs, and while they were engaged in repairing the car, other cars pushed this car along the track in such a manner as to cause the car to break and mangle the left arm of plaintiff, one of the subordinate employees. Plaintiff had nothing to do with the movement of the cars pushed against the car under which he was working; he did not know and could not have known, in the situation he was in, that cars were being pushed against the car under which he was at work, until they struck the car; no notice or warning from the foreman, or by signal bell or otherwise, was given him of the approach of the cars; it was not in his power to prevent the collision of the cars, or to save himself by the exercise of reasonable care from injury. At the time, the foreman was present overseeing the work and it was his duty to notify the yard master having control of the management of the cars, when and where he was going to repair a car. No signal flags were furnished by the company or used by the foreman to designate the car that was being repaired. It was held that it was the duty of the foreman as the representative of the company to see that reasonable precautions were taken to protect and guard his subordinates while engaged in the discharge of their duties under the cars where he had placed them, against danger arising from the switching of cars and making up trains on the same track; and from an injury resulting from his negligence in this respect, the company was liable.

Employee Injured While Pushing Car—Negligence in Causing Switch to Be Thrown—Foreman with Absolute Control of Hands.—In *Consolidated Kansas City Smelting & Refining Co. v. Peterson* (Kan. App.), 55 Pac. 673, the claim of negligence was that defendant, by causing a switch to be thrown, changed the direction of the car which plaintiff was ordered to assist in pushing along the track to another track, so that it ran so close to defendant's platform as to put him in imminent peril, whereby he was crushed and injured, without notice to him that the peril would be the inevitable consequence thereof. And it appeared that defendant's foreman, who was directing the moving of the car, had authority to employ the hands on defendant's work; that he had absolute control of all of them, not only in that, but in all of the work about which they were employed, without any immediate directions or supervision of any officer of defendant; that he had full authority to, and did, direct them from one kind of employment to another in defendant's service. It was held that the foreman was not a fellow servant of plaintiff, but stood in the relation of principal to him, and that this relation was not changed by the fact that the immediate time the plaintiff was caught between the car and platform, and injured, the foreman was walking on the platform, above the men, with one hand on the car, assisting to push it.

Fall of Defective Derrick—Negligence of Foreman Charged with Duty of Reporting Defects.—In *Kansas Pac. Ry. Co. v. Little*, 19 Kan. 267, it appeared that plaintiff was injured by the fall of a derrick while in the employ of a railroad company as laborer in building a culvert. It was shown that O. superintended the work in building the culvert; that he hired the plaintiff, and had the power to hire and discharge such laborers whenever he thought proper to do so; and although the materials and machinery for the work was furnished to O. by other and superior agents of the company, yet that it was the duty of O. to inspect such machinery, to see that it continued in good order, and to report to his superiors so that they might furnish him other machinery if it became defective; that while O. was using such derrick it became defective and he knew it, but he nevertheless continued the work and continued to use it, and in consequence of such defect it fell and injured plaintiff while he was at work for the company. It was held that plaintiff and O. were not mere fellow serv-

Note

ants of the railroad company, but that O., with reference to the plaintiff, was a superior servant or agent, and the representative of the railroad company, and that the company was responsible to plaintiff for such injuries.

KENTUCKY.

The only difference between the rule in this state and that of Ohio, is that in the latter state the master is liable for mere negligence on the part of a superior servant, while in Kentucky the master is liable for injury to a servant caused by the negligence of a superior servant only when such negligence is gross. *Cincinnati, etc., R. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199; *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. 649; *Louisville, etc., R. Co. v. Foard* (Ky.), 47 S. W. 342; *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188, 24 S. W. 119; *Newport News, etc., R. Co. v. Carroll* (Ky.), 31 S. W. 132; *Louisville & N. R. Co. v. Brantley*, 96 Ky. 297, 28 S. W. 477; *Louisville & N. R. Co. v. Brook*, 83 Ky. 129; *Louisville & N. R. Co. v. Moore*, 83 Ky. 675; *Newport News & M. V. Co. v. Dentzel*, 91 Ky. 42, 14 S. W. 958.

Where two servants are engaged in the same field of labor, but are not of the same rank, the master is liable for an injury to the subordinate by the gross negligence of the superior, but not for an injury resulting from ordinary negligence. So held in *Cincinnati, etc., R. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199.

Servants in Different Departments.—In *Green v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. 649, it is held that it is only when the injured employee and the negligent employee are in different departments of service that a recovery may be had for ordinary negligence.

Who Are Fellow Servants.—In *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188, 24 S. W. 119, it is said in the opinion: "The rule in nearly all the states for determining who are fellow servants is based on the character of the act being performed by the neglectful employee, and is not determined from his grade or rank or that of the injured servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employee, whatever may be his grade or rank, or by whatever name he may be designated, is not a fellow servant, but an agent; but as to all other acts they are fellow servants."

* * * This rule was never adopted in Kentucky, or rather, this limitation on the responsibility of the principal was never admitted here, but from the start was extended so as to apply the rule of law applicable to principal and agent to a system based on the relation of the offending employee to the injured one; that is, his grade of service in point of being superior in power or authority to the other."

Fireman, Acting as Engineer, and Brakeman.—A fireman, when acting as engineer, is the superior of a brakeman of his train. So held in *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. 649.

LOUISIANA.

Here the limitation seems to be favored. See *Evans v. Louisiana Lumber Co.*, 111 La. Rep. 534; *Ingham v. John B. Honor Co.*, 113 La. Rep. 1040; *Van Amburg v. Vicksburg, S. & Pac. R. Co.*, 37 La. Ann. 650.

Manager with Authority to Command and Have Discharged.—An employee is not the fellow servant of the manager of the master. So held in *Bonnin v. Town of Crowley*, 112 La. Rep. 1025. In this case it is said in the opinion: "It may be that he was not directly employed by this manager, or that he was not to be discharged by him of his own motion; and yet it was this manager he was to obey, who would have reported him, had he failed in his duties, and it was the manager who could by his report have obtained his discharge from the defendant's service."

Note

Person Directing Operation of Appliance Superior of Person Working under His Orders and Directions.—An employee was not the fellow servant of the person injured, where he directed the operation of the appliance while the person injured was under his orders, and obeying his directions, and assisting in the work directed by the former. So held in *Evans v. Louisiana Lumber Co.*, 111 La. Rep. 534.

Person in Charge of Laborers Engaged in Unloading Ship—Unsafe Staging.—A laborer working in discharging a vessel is not the fellow servant of the one who has charge of the laborers, and who is to see to the unloading of the ship. So held in *Ingham v. John B. Honor Co.*, 113 La. Rep. 1040. In this case it appeared that plaintiff was called into work by the foreman on a platform or staging after it had been erected and which he had a right to infer had been safely erected.

Control of Department, and Authority to Hire and Discharge.—In *Mattise v. Ice Co.*, 46 La. Ann. 1535, 16 So. 400, it is held that there is a distinction between servants of a corporation exercising no supervision over others engaged with them in the same employment and employees clothed with the control of a department, with authority to employ and discharge the servants of the master. The servant is supposed to know and assume the risk of his fellow servant's carelessness and negligence; but he does not risk the carelessness and negligence of those placed over him by the master.

Conductor and Engineer—Doctrine of Ross Case Approved.—In *Van Amburg v. Vicksburg, S. & Pac. R. Co.*, 37 La. Ann. 650, it is held that the doctrine of fellow service releasing a railway company from liability for injuries, because the servant injured is fellow with the servant through whose fault the injury was suffered, is modified, and it is now established that a conductor of a train represents the company for the time and is the master of the engineer who is obliged to obey his orders. In this case it is said in the opinion: "The case of *Chicago, M. & St. Paul R. Co. v. Ross*, 112 U. S. 377, has made an inroad on jurisprudence in the right direction, and we have applied the new principal there established at the present term."

MAINE.

Here the limitation in question has always been rejected. See *Beaulieu v. Portland Co.*, 48 Me. 291; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112; *Lawler v. Androscoggin R. Co.*, 62 Me. 463; *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488.

Foreman of Job.—The foreman, superintendent or overseer of a job of work, is not on that account to be regarded as other than a fellow laborer. Whether an employee occupies the position of a fellow servant to another of the common master depends upon whether he is, or is not, charged with the performance of a duty which properly belongs to the master. So held in *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112.

Conductor of Construction Train—Injury to Hand Ordered to Jump from Moving Car—Negligence in Securing Pawl.—In *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488, it appeared that a person in charge of a railway construction train ordered plaintiff's intestate, an employee of defendant, to jump upon a car from a station platform, while the train was in motion. The intestate caught hold of a stake in a platform car, the stake not being at the time properly secured by the dog or pawl which serves to keep the stake in a firm and upright position, and thereby fell under the wheels of the cars and was injured. It was held that the conductor who gave the order and the employee who neglected to secure the pawl in place, were fellow servants with the employee who was injured, in a common and associated service, and that the injured employee could not maintain an action against the railroad company for the injury.

Note

Foreman and Laborer—Management of Entire Business or of Distinct Department.—Persons who are employed under the same master, derive authority and compensation from the common source, and are engaged in the same general business, although one is the foreman of the work, and the other is a common laborer, are fellow servants; and take the risk of each other's negligence. But an exception to the rule exists if the master has delegated to the foreman or superintendent, the care and management of the entire business, or a distinct department of it; the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master. So held in *Doughty v. Penobscot Log Driving Co.*, 76. Me. 143.

MARYLAND.

The court of last resort of this state is in line with the weight of authority in rejecting the limitation as a common-law doctrine. See *Baltimore v. War*, 77 Md. 593, 27 Atl. 85; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994; *Shauck v. North Cent. R. Co.*, 25 Md. 462; *State v. Malster*, 57 Md. 287; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 410; *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280.

Mere Superiority of Grade of Negligent Servant Not the Test.—In *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280, it is said in the opinion: "The law is well settled that one of the risks which a servant assumes when he enters the employment of a master, is the negligence of fellow servants. But who are fellow servants in the service of an individual master or a corporation is a subject that has been much discussed, and about which there is some conflict of authority. The question however has been before this court on several occasions, and we must follow our own decisions. In *Wonder's Case*, 32 Md. 418, it was laid down as a general rule, that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow servants, each taking the risk of the other's negligence."

In *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338, it is said in the opinion: "Nor is the liability of the master enlarged or made different by the fact that the servant who has suffered the injury occupied a grade in the common service inferior to that of the servant whose misconduct caused the injury complained of."

Manager or Superintendent Entrusted with All Master's Duties.—But in *State v. Malster*, 57 Md. 287, it is said in the opinion: "To the general rule however there is this qualification or exception, that where the middleman, or superintendent is entrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant, there the master may be liable for the omission or neglect of the manager or superintendent in respect to those duties. If the master relinquishes all supervision of the work, and entrusts not only the supervision and direction of the work, but the selection and employment of laborers, and the procuring of materials, machinery and other instrumentalities necessary for the service, to the judgment and discretion of a manager or superintendent, in such case the latter becomes a vice principal, and for the omissions or negligence in discharge of those duties, the principal, will be liable."

MASSACHUSETTS.

In this jurisdiction the decisions of the court of last resort are unanimous in rejecting the limitation as a common-law doctrine. See *Floyd v. Sugden*, 134 Mass. 563; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Howard v. Hood*, 155 Mass. 391, 29 N. E. 630; *Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450; *McKinnon v. Norcross*, 148

Note

Mass. 533, 20 N. E. 183; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 34 N. E. 185; *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152.

Negligence of Foreman or Superintendent.—In *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 34 N. E. 185, it is held that a master is not responsible, at common law, for the negligence of a superior servant, whereby injury is sustained by an inferior servant; and the rule applies where the superior employee is the foreman or superintendent, and the inferior servant a laborer under him.

Negligence of Submanager or Foreman.—In *Holden v. Fitchburg R. Co.*, 129 Mass. 268, it is held that the rule that an employee cannot recover against his master for the fault or negligence of a fellow servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the injured employee.

Employee Superintending Digging of Trench and Laborer Are, Prima Facie, Fellow Servants.—In *Flynn v. Salem*, 134 Mass. 351, it is held that a person employed by a city to superintend the digging of a trench, and a laborer employed to dig it, are, prima facie, fellow servants; and, to maintain an action against the city for personal injuries occasioned to the laborer by the negligence of the superintendent, the declaration must allege facts, the legal effect of which is that they are not fellow servants.

Injury to Hand Digging Trench—Failure of Superintendent to Use Shoring.—In *Floyd v. Sugden*, 134 Mass. 563, it is held that if a person hired to dig a trench is injured by the caving in of the sides of the trench, his employer is not liable to an action for such injury, if he furnished the materials for sheathing or shoring up the sides of the trench, and the materials were not used for that purpose by the person employed by him to superintend the digging of the trench, as the latter and the laborer were fellow servants.

Caving in of Sewer—Injury to Laborer—Failure of Superintendent to Use Shoring.—In *Zeigler v. Day*, 123 Mass. 152, an action by a laborer against his employer to recover for personal injuries caused by the falling in of the sides of a sewer in which the laborer was at the time at work, it appeared that the employer was a contractor for the construction of the sewer; that the laborer was at work at the time of the accident under the direction of a superintendent, who had charge of the work and was admitted to be skillful and competent, and who was to receive, as compensation for his services, one-half the profits; and that, for the safety of the men, it was necessary, in some dangerous places where the soil was loose, to place planks properly braced to keep the sides from falling in; and that this was not done. Plaintiff also offered to show that the system of construction was unsafe and defective. There was no evidence that the employer failed to furnish sufficient or suitable material for the safeguards, or that he was chargeable with any personal specific neglect, or knew of the cause of the accident. It was held that the superintendent was a fellow servant of the laborer, and that the action could not be maintained.

Injury to Seaman—Breaking of Triangle—Negligence of Mate in Constructing and Ordering Use of Appliance.—In *Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450, it is held the owners of a coasting vessel are not liable for injuries occasioned to a seaman on board the vessel while in port, and in command of the mate, through the breaking of a triangle on which the seaman was sitting and scraping the mast, as they had furnished proper materials for the construction of the triangle, and the injury was caused by the negligence of the mate in

Note

constructing it and in ordering the seaman to use it, which was the negligence of the latter's fellow servant.

MICHIGAN.

Here it is held that the fact that the negligent servant had authority over, or was of superior grade to the employee injured by reason of his negligence, is immaterial in determining the question of their common master's liability for the injury, unless the superior servant had been invested with the entire control of the master's business or of a distinct department of the business. See *Beesley v. Wheeler & Co.*, 103 Mich. 196, 61 N. W. 658; *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226, 57 N. W. 116; *Schroeder v. Flint & Pere Marquette R. Co.*, 103 Mich. 213, 61 N. W. 663.

Superintendent of Factory Charged with Duty of Keeping Machinery in Order—Negligence in Starting Planer.—In *Shumway v. Walworth & Neville Mfg. Co.*, 98 Mich. 411, 57 N. W. 251, it is held that defendant's superintendent, to whom it had delegated general authority to manage the business, including the duty to see that the machinery in its factory was kept in good order, is held to have been plaintiff's superior servant while starting a planer which plaintiff was oiling, and thereby injuring the latter. This, however seems to be a misapplication of the rule. In this case it is said in the opinion: "The decisions of this court have extended the rule so that it may be said that when the master delegates to a superintendent full power to manage a business, and employ and discharge servants, without interference, such superior servant, in whatever he does in furtherance of the business and operations he has in charge, stands in place of the master, and the negligence of such superior servant is the negligence of the master;" and *McKinney on Fellow Servants* (section 41) is quoted as supporting this position. But this appears to be a misapplication of the rule.

Injury to Shoveler on Gravel Train—Order to Jump upon Another Car—Negligence of Foreman in Widening Distance—Work outside Scope of Employment.—A shoveler on a gravel train was ordered by the foreman, who was his superior servant, to uncouple an empty car from a loaded one, and to jump from it to the loaded car. While he was in the act of jumping, and without notice to him, the foreman let off the brake, and thus suddenly widened the distance between the cars, and the shoveler fell into the open space, and was injured, without fault on his part. It was held that the company, the common master was liable. *Erickson v. Milwaukee, L. S. & W. Ry. Co.*, 93 Mich. 414, 53 N. W. 393.

However, in thus holding, the court was merely following *Harrison v. Railroad Co.*, 79 Mich. 409, 44 N. W. 1034, where the rule is laid down that: "When the offending servant, having general power and authority to employ and discharge servants, and having authority to direct and control the injured servant, orders him to an act not within the scope of the injured servant's employment, whereby he is exposed to danger not contemplated in his contract of service, and he is injured in so doing, the master is liable."

Foreman in Charge of Gravel Train—Power to Hire and Discharge.—A foreman who has full charge of a gravel train, with power to hire and discharge all men working thereon, and to whom alone they can complain, is not a fellow servant of such employees, but a superior, for whose negligence the common master is responsible. So held in *Erickson v. Milwaukee, L. S. & W. Ry. Co.*, 93 Mich. 414, 53 N. W. 393.

Power to Employ and Discharge.—In *Palmer v. Michigan Cent. R. Co.*, 93 Mich. 363, 53 N. W. 397, it is held that while it is not necessary to show it by positive proof in every case, yet the question whether or not the servant has power to employ and discharge other servants is important in determining whether or not he is deemed

Note

to be a superior servant, for whose acts the master is liable. But in this state a superior servant must at least be in charge of a distinct department of the master's business.

MANAGEMENT OF MASTER'S BUSINESS OF A DISTINCT DEPARTMENT.

Full Control of Particular Branch of Master's Business.—In *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502, it is held that where the business conducted by a person selected by the master is such that he is invested with full control (subject to no one's supervision except the master's) over the action of the employees engaged in carrying on a particular branch of the master's business and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey them, he stands in the place of the master, and is not a fellow servant of those whom he controls.

Full Power to Manage Business.—In *Shumway v. Walworth & Neville Mfg. Co.*, 98 Mich. 411, 57 N. W. 251, it is said in the opinion: "The decisions of this court have extended the rule so that it may be said that when the master delegates to a superintendent full power to manage a business, and employ and discharge servants, without interference, such superior servant, in whatever he does in furtherance of the business and operations he has in charge, stands in place of the master, and the negligence of such superior servant is the negligence of the master. This is apparently upon the ground that the servant, in entering the employment, does not take upon himself the risk of negligence on the part of one who occupies that relation to the business of the master."

Assistant Road Master and Section Hands—Absolute Power to Hire and Discharge.—An assistant road master who has general charge of a division of a railroad, and of the section hands thereon, which control is absolute as far as their employment and discharge are concerned, is not a fellow servant with them, but must be held to represent the company, which is responsible for his negligence while in the performance of the duties so delegated to him. So held in *Harrison v. Detroit, L. & N. R. Co.*, 79 Mich. 409, 44 N. W. 1034.

Yard Master and Hands—Authority to Hire and Discharge.—A yard master who has full charge of the yards of a railroad company, and hires and discharges the men employed therein, and assigns them to their labor, is the agent or vice principal of the company in this respect. So held in *Lyttle v. Chicago & West M. Ry. Co.*, 84 Mich. 289, 47 N. W. 571.

Collision—Death of Fireman—Negligence of Train Dispatcher.—Where by reason of the failure of a train dispatcher to notify one of two engineers of the point established for two engines, and to order one of them held at such point, a collision occurred, and the fireman on one of the engines was killed. It was held, in an action against the railroad, that the rule, that a train dispatcher who has absolute control over a division of a railroad, so far as the running and operating trains is concerned, is not a fellow servant with other employees acting under his orders, was applicable. *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502.

Character of Negligent Act the Test.—In *Beesley v. Wheeler & Co.*, 103 Mich. 196, 61 N. W. 658, it is held, as said by a text writer (McKinney, on Fellow Servants, § 23) "the true test whether an employee occupies the position of fellow servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master."

Note

Foreman of Gang Loading Hand Car—Injury from Fall of Load.—In *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226, 57 N. W. 116, it appeared that plaintiff belonged to a gang of four men, including the foreman; and that while assisting in loading ties on a hand car, he was injured by reason of some of the ties falling off. There was no evidence tending to show negligence in the employment of any of the men. It was held that the four men were fellow servants, and that a verdict was properly directed for defendant.

Foreman Directing Work under Instructions of Division Road Master—Moving Car without Warning.—In *Schroeder v. Flint & Pere Marquette R. Co.*, 103 Mich. 213, 61 N. W. 663, it appeared one of a gang of men at work for a railroad company under the charge of a foreman, unloading and leveling dirt hauled upon the premises by another railroad company, was injured by the backing of the engine against the loaded cars, from which it had been detached; that the foreman kept the time of the men, counted the cars, directed the men where and how to work, saw that they did their work properly, directed the place where the train should stop for unloading, notified the men when to cease leveling and commence unloading, and then assisted in doing the work; that he was under the immediate and direct control of the division road master, from whom he received instructions to keep the time and number of cars, and directions in relation to the work. In an action against the company by the injured employee to recover for the injury, the sole act of negligence alleged as ground for recovery was that the foreman failed to give notice to the men under his charge that the train was about to move. It was held the foreman and the injured employee were fellow servants.

Section Foreman in Charge of Train—Mere Authority to Represent Master in Accordance with Instructions.—In *Morch v. Toledo, etc., R. Co.*, 113 Mich. 154, 71 N. W. 464, it appeared that a road master placed a section foreman in charge of a train sent out to distribute ties, with instructions as to the loading, removing, and handling of the ties; that no general power was conferred upon the foreman to make up and send out trains, to determine when and where they should go, to employ and discharge workmen, or to represent the road master other than upon the particular occasion, in accordance with his instructions. It was held that the foreman did not become a vice principal of the company, so as to render it liable for injuries to one of the workmen resulting from the negligence of the foreman while in charge of the train.

MINNESOTA.

Here the majority rule has always been sustained by the supreme court of the state. See *Brown v. Winona & St. Paul R. Co.*, 27 Minn. 162, 6 N. W. 484; *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135, 70 N. W. 1078; *Carlson v. Northwestern Tel. Exch. Co.*, 63 Minn. 428, 65 N. W. 914; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020; *O'Neill v. Great Northern Ry. Co. (Minn.)*, 17 Am. & Eng. R. Cas., N. S., 415; *Olson v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 117, 35 N. W. 866; *Fraker v. St. Paul, M. & M. Ry. Co.*, 32 Minn. 55, 19 N. W. 349.

In *Brown v. Winona & St. R. Co.*, 27 Minn. 162, 6 N. W. 484, it is said in the opinion: "The great majority of courts, both in this country and in England, hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow servants as regards the liability of the master for injuries to one caused by the negligence of the other. If the servant is supposed to assume the risks which the master with due care and diligence, cannot prevent, and we think it is so, then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself. For, in respect to such overseers or superior servants, the master, when he has used due care

Note

in selecting them, cannot prevent their casual negligence, any more than he can prevent the casual negligence of those of inferior grade."

Title or Rank Not the Test.—The decisive test whether an employee is to be regarded as a vice principal or a fellow servant, is not his title or rank, but the nature of the services he performs. If he is authorized to perform duties which are the absolute duties of the master, he is, to the extent of a discharge of such duties a vice principal. So held in *Carlson v. Northwestern Tel. Exch. Co.*, 63 Minn. 428, 65 N. W. 914.

In *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, it is said in the opinion: "That it is not the rank of the employee, or his authority over other employees, but the nature of the duty or service which he performs, that is decisive; that, whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employees, he stands in the place of the master, but as to all other matters he is a mere coservant. It follows that the same person may occupy a dual capacity of vice principal as to some matters and of fellow servant as to others."

In *O'Neill v. Great Northern Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 415, it is said in the opinion: "The distinctions which exist between a superior servant and a vice principal are clearly designated and distinguished in a still later case, which holds that such superiority in rank in the service does not indicate the relation of vice principal between such superior servant and the one who works under him. The relation referred to arises usually from the peculiar character of the services rendered rather than the grade of employment. *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793."

Foreman of Track Men.—The foreman of a gang of track men, engaged in the discharge of his ordinary duties in the course of his employment, is a fellow servant with them. So held in *Olson v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 117, 35 N. W. 866.

Fall of Trestle—Failure to Properly Brace—Negligence of Foreman of Construction Gang—Authority to Hire and Discharge.—In *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, it appeared that defendants were engaged in grading a line of railroad; that the work was done by cutting down one part, and with the material making a fill in another part; that the material was conveyed from the cut to the fill in dirt cars; that in the dump these cars were run on a track laid on a temporary trestle, constructed with material furnished on the ground by defendants; and, as the dump was filled, this trestle was from time to time extended; that part of the men worked in the cut, others drove the teams which drew the cars, others unloaded the cars and shoveled on the dump, and another one, Johnson, framed the vents and built the trestle, but all were subject to be called, on the orders of the foreman, from one part of the work to another; that Murdock, a foreman, was in charge of the work, and gave all the orders to the men, where to work and what to do, and also hired and discharged men on the work; that on the occasion in question, it being decided to raise additional vents and lengthen the trestle the foreman called upon plaintiff and one P. to assist J.; that while plaintiff, P., and his foreman were on the trestle, attempting to shove out two stringers to reach the new vent, the trestle fell, and plaintiff was injured; and that the cause of the accident was that the trestle was not properly braced. It was held that in the matter of building the trestle, the foreman was a fellow servant with the workman under him.

Gang Moving Damaged Cars—Negligence of Foreman Subject to Yard Master's Orders.—In *Fraker v. St. Paul, M. & M. Ry. Co.*, 32

Note

Minn. 54, 19 N. W. 349, it appeared that plaintiff with other servants, was employed to assist in handling and removing cars in the yard of the defendant, including, also, as a part of his duty, the removal of damaged or broken cars to the proper place for repairs, under the direction of a foreman, who was subject to the orders of a yard master and division superintendent. It was held that, as respects risks arising from the acts and omissions of such foreman in the course of such employment, he was to be deemed the fellow servant of plaintiff.

Injury to Employee Ordered into Dangerous Place—Work Outside Scope of Employment.—But in *Cook v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 45, 24 N. W. 311, it appeared that the work in which plaintiff was engaged when he received the injury complained of was wholly outside of that for which he entered defendant's service, and outside the line of defendant's usual business, and the entire general charge, superintendence, and direction of it, as in the nature of a distinct department of business, had been committed to B. and K., at least as far as plaintiff and his coemployees were concerned. It was held that B. and K. stood in the shoes of their principal, the defendant, as respects the place where plaintiff should work, and in sending him to such place of danger, so that their negligence in so doing was the negligence of defendant.

Foreman of Gang Excavating Ditch—Authority to Hire, Discharge and Command—Injury to Hand Ordered into Dangerous Place.—And in *Carlson v. Northwestern Telephone Exchange Co.*, 63 Minn. 428, 65 N. W. 914, it appeared that defendant, in excavating a ditch, placed the work and the men employed thereon, of whom plaintiff was one, in charge of a foreman, who had general oversight of the work; that the men were subject to his orders, and he had authority to employ and discharge them and to direct them what to do and where to work, and was the supreme authority there present. The foreman negligently ordered plaintiff from the place where he had been working into the ditch at a point where he had not previously worked, which was a place of unusual danger by reason of a crack in the earth on the side of the ditch, and defects in the curbing; which danger and defects were not obvious or known to plaintiff, who obeyed the order, and was injured by the caving in of the ditch. It was held that in giving the order the foreman was a vice principal and defendant responsible for his negligence.

MISSISSIPPI.

The limitation does not seem to be favored in this jurisdiction as a common-law rule. See *Evans v. Louisville, etc., R. Co.*, 70 Miss. 527, 12 So. 581; *Lagrone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. 432.

Injury to Servant Ordered to Certain Position—Attempt of Section Master to Straighten Fish Bar—Authority to Hire and Discharge.—In an action against a railroad company, it was alleged that a section master, having authority to employ and discharge section laborers and to direct their work, in track repairing, discovered a bent and defective fish bar, and, instead of applying for a new one, as was his duty, directed plaintiff, one of the laborers employed by him, who was inexperienced, and not aware of any danger, to a certain position while he attempted to straighten it by blows with a heavy hammer. By reason of his negligence and want of skill in striking the fish bar, the hand of plaintiff was severely injured. It was held, on demurrer, that the company was not liable, as the plaintiff and the section master were fellow servants. *Lagrone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. 432.

MISSOURI.

In this jurisdiction the Illinois modification of the superior servant limitation seems to prevail. See *Sullivan v. Hannibal & St. J. Ry.*

Note

Co., 107 Mo. 66, 17 S. W. 748; *Schroeder v. Chicago & A. R. Co.*, 108 Mo. 322, 18 S. W. 1094; *Koke v. St. Louis, K. & N. Ry. Co.*, 88 Mo. 360; *Moore v. Wabash, St. L. & P. Ry. Co.*, 85 Mo. 588; *Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165, 21 S. W. 916; *Gormley v. Vulcan Iron Works*, 61 Mo. 492; *McDermott v. Hannibal & St. J. R. Co.*, 87 Mo. 285; *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 19 S. W. 38; *Stephens v. Hannibal & St. J. Ry. Co.*, 86 Mo. 221; *Tabler v. Hannibal & St. Joseph R. Co.*, 93 Mo. 79, 5 S. W. 810.

But some of the Missouri decisions seem to go so far as to support the Ohio rule without restriction, see *infra*, subsection entitled "Ohio Doctrine Supported."

In *Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165, 21 S. W. 916, it is said in the opinion: "It is part of his (the master's), personal duty to direct the work he has in hand, and, where it is complex (as that of railroading), to provide and enforce reasonable and necessary regulations of the labor engaged therein. * * * But the master's function of directing a large enterprise must of necessity be entrusted, as to many details, to subordinate employees. In exerting that function they perform the master's part, and for their action (within the scope of that delegated authority, and as to those placed under their orders), the master is responsible whether the superintending employee has or has not power to hire and discharge, and whatever may be the title by which he is designated."

Foreman Directing Work.—A foreman is not a fellow servant of a man under his orders in respect to his performance of the master's duty of directing the work in his charge. So held in *Schroeder v. Chicago & A. R. Co.*, 108 Mo. 322, 18 S. W. 1094.

Injury to Laborer Engaged in Removing Building--Negligence of Foreman Ordering Use of Defective Staging.—A foreman in charge of laborers engaged in removing a railroad company's building is the vice principal of the company and not a fellow servant of such laborers; and where such foreman directs one of the laborers to use a defective staging, and injury to the latter results therefrom, the company, the common master, is liable. So held in *Sullivan v. Hannibal & St. J. Ry. Co.*, 107 Mo. 66, 17 S. W. 748.

Injury to Member of Wrecking Crew—Wrong Signal Given by Road Master.—In *Koke v. St. Louis, K. & N. Ry. Co.*, 88 Mo. 360, it appeared that a road master, having general superintendence of defendant's track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work, gave a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal was injured. It was held that the railroad company was liable for such injury, as the road master was not a fellow servant of the injured employee, but represented the company in the transaction as its vice principal, and his negligence in giving the wrong signal was that of the railroad.

Section Foreman and Hands.—A section foreman who is intrusted by the railroad company with power to superintend, direct, and control the workmen under his charge is not a fellow servant of such workmen in exercising such authority. So held in *McDermott v. Hannibal & St. J. R. Co.*, 87 Mo. 285.

Fall of Embankment—Injury to Hand—Negligence of Foreman—Power to Command.—In *Bradley v. Chicago, M. & St. P. Ry. Co.*, 138 Mo. 293, 39 S. W. 763, it appeared that plaintiff was employed by defendant railroad company to help load cars with earth from an embankment thirty feet high near the railroad track, and the embankment was undermined by a steam shovel, and while other of defendant's servants were prying against the top thereof with crow-bars, all under the direction of a foreman, the embankment toppled over and injured plaintiff. It was held that such foreman was the representative of the railroad, and not a fellow servant of the laborers

Note

who received their orders from him; and if the foreman was negligent, the railroad was responsible; but that this rule was necessarily modified if the place provided becomes dangerous in the necessary performance of the work.

Section Foreman—Power to Hire, Discharge and Control.—A section foreman of a railroad who has power to employ and discharge the men under him and the control of their work and movements is a vice principal. So held in *Russ v. Wabash Western Ry. Co.*, 112 Mo. 45, 20 S. W. 472.

Negligence in Superintending, Directing or Controlling Workmen.—In *Moore v. Wabash, St. L. & P. Ry. Co.*, 85 Mo. 588, it is held that he is a vice principal who is entrusted by the master with power to superintend, direct or control the workmen in his work, and for negligence in such superintendence, direction or control, the master is liable.

Dual Capacity Doctrine.—In *Fogarty v. St. Louis Transfer Co.* (Mo.), 79 S. W. 664, 11 R. R. R. 578, 34 Am. & Eng. R. Cas., N. S., 578, the court, through Marshall, J., after reviewing the previous decisions of the supreme court of Missouri, says: "Thus from the 47th. to the 172d. volumes of the reports of the decisions of this court, extending over a period of thirty-two years, the 'dual capacity doctrine,' has been recognized and enforced by this court."

In *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 19 S. W. 58, it is said in the opinion: "There is no doubt but that a foreman or other representative of the master may occupy a dual position; that is to say, he may at the same time be a fellow servant and an agent or representative of the master. There are certain duties which are personal to the master, and for the nonperformance of which he is liable to his servants. These duties may be delegated to a foreman or even a servant, and the master is still liable for their nonperformance. Again, cases often arise where the master becomes liable by reason of the fact that he undertakes by himself or through a representative to do certain things which might have been left to he servant to perform. Thus, where the master provides suitable materials for a staging and intrusts the duty of erecting the structure to the workmen as a part of the work which they undertake to perform, he is not liable for injuries resulting to one of them from the falling of the staging; but, if the master undertakes to furnish the stage, he must use due care in its erection, and if there is negligence on his part or of one representing him in that regard, he is liable for injuries resulting to the servant using the structure."

Power to Employ and Discharge No Conclusive Test.—In *Glover v. Kansas City & B. & N. Co.*, 153 Mo. 327, 55 S. W. 88, it is held that the power to employ and discharge is not always a conclusive test of the relation of master and servant; that fellow servant is a relative term, to be determined by the special conditions of each case. See also, *Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165, 21 S. W. 916.

OHIO DOCTRINE SUPPORTED.

Some of the Missouri decisions seem to support the Ohio rule without restriction.

Boss of Roundhouse and Laborer—Negligence in Performing Manual Labor.—Where an employee is in charge of a roundhouse, the engines there, and the men required to care for them, he is not to be regarded as the fellow servant of a laborer working at the same time under his orders, in respect to acts done by the former in pursuance of his authority over the branch of business under his charge. And the fact that such "boss" personally acted in a negligent manner, whereby plaintiff was injured, will not relieve the company of liability, where the act was done within the scope of authority of the "boss" to direct and control as the representative of the master. So held in *Dayharsh v. Hannibal & St. J. Ry. Co.*, 103 Mo. 570, 15 S. W. 554.

Note

Derailment of Hand Car—Injury to Section Hand—Section Foreman Allowing Keg to Fall Off.—Where a section foreman under whom plaintiff was employed, who had authority to employ and discharge the men under him and the control of their works and movements, directed a water keg to be placed on the front end of a hand car for his seat so that he could look ahead and observe the track, and while the car was in motion got up and allowed the keg to fall off, thus causing the car to leave the track and injure plaintiff, the injury was occasioned by the negligence of the foreman in the line of his duty, and the company was responsible therefore. So held in *Russ v. Wabash W. Ry. Co.*, 112 Mo. 45, 20 S. W. 472.

Superior Servant Does Not Divest Himself of Responsibility by Engaging in Manual Labor.—In *Haworth v. Kansas City Southern Ry. Co.* (Mo.), 68 S. W. 111, 3 R. R. R. 235, 26 Am. & Eng. R. Cas., N. S., 235, it is said in the opinion: "A superior or vice principal in charge of workmen does not become a coworkman whenever he actively assists in the manual performance of a task, instead of superintending it. If he chooses to take on himself the role of laborer, he may do so; but he does not thereby divest himself of his responsibility as foreman or superintendent and his duty to see that work is done in a careful way. The judgment and care which he must use as superintendent to see that precautions are taken to avoid harm to his gang continues to be exacted of him by the law, although he may have stepped down from his pedestal for an interval. *Russ v. Railroad Co.*, 112 Mo. 45, 20 S. W. 472; *Dayharsh v. Railroad Co.*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; *Steube v. Foundry Co.* (St. L.), 85 Mo. App. 646."

VICE PRINCIPALS.

Injury to Track Repairer—Conductor of Material Train and Foreman as Vice Principals.—A conductor of a material train, having control of it and its movements, and the foreman over a crew of men engaged in repairing a railroad track, having power to direct them, are vice principals; and the company is responsible for the death of a member of the crew caused by their negligence. So held in *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 19 S. W. 58.

Foreman in Charge of Distinct Piece of Work.—In *Dowling v. Gerard B. Allen & Co.*, 74 Mo., it is held that a foreman in charge of a distinct piece of work in an extensive foundry, having under him laborers bound to obey his orders, is as to them a vice principal of their employer, and not their fellow servant, and this although another may be general foreman of the entire establishment, with authority over him.

Caving in of Sewer—Defective Bracing—Negligence of Street Superintendent—Foreman in Immediate Charge.—In *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571, it is held that where the superintendent of the streets of a city, having charge of the construction of a sewer, provides all material for bracing the sides of the work and directs the manner of placing them and the work is done accordingly, and a laborer, while working in the trench is injured because of a defective bracing, such negligence is that of the city, and not of a fellow servant, though a foreman was in immediate charge of the work.

Train Dispatcher and Trainmen.—In *Smith v. Wabash, St. L. & P. Ry. Co.*, 92 Mo. 359, 4 S. W. 129, it is held that a train dispatcher, who has the control of the movements of trains, and to whose orders the conductors and engineers are subject, is the company, and is not a fellow servant with those engaged in operating and moving the trains.

Superintendent with Power to Hire, and Discharge, and to Provide and Remove Materials.—When a master delegates to a superintendent the power to employ and discharge servants and to provide and remove material, which duties adhere to him as master, he

Note

thereby makes himself liable for any injuries sustained by his servants, caused by the lack of care or negligence of such superintendent. So held in *Brothers v. Carter*, 52 Mo. 372.

MONTANA.

Here the superior servant limitation is rejected. See *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795; *Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293, 45 Pac. 210, 4 Am. & Eng. R. Cas., N. S., 419; *Hastings v. Montana U. Ry. Co.*, 18 Mont. 493, 46 Pac. 264.

In *Hastings v. Montana U. Ry. Co.*, 18 Mont. 493, 46 Pac. 264, it is said in the opinion: "In accordance with the doctrine of the *Hambly* case (154 U. S. 349), and the later decision of *Northern Pacific Ry. Co. v. Peterson*, 162 U. S. 346, this court in *Goodwell v. Mont. Cent. Ry. Co.* (18 Mont. 293, 45 Pac. 210), cited above, held that where an employee, a laborer repairing defendant's roadbed and under the orders of a section boss, was injured through the negligence of such boss, the laborer and the section boss were fellow servants and for an injury so received the company was not liable.

In principal there is, under the facts of the case at bar, no difference between the *Hambly* case and this one. The negligence, if any there was, which caused the death of deceased was the negligence of his coservants in performing duties devolving upon them."

Foreman of Track Repairers—Failure to Warn before Giving Order to Bear Down on Rail.—In *Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293, 45 Pac. 210, 4 Am. & Eng. R. Cas., N. S., 419, it is held that the foreman or boss of a small extra gang of six men engaged in repairing defendant's railroad is not clothed with the control and management of a distinct department, but of a mere separate piece of work in one of the branches of the service in a department, and, therefore, negligence of the foreman in not giving warning before ordering the men to bear down on a rail which broke and injured the plaintiff, a member of the gang, was not the neglect of a duty which the defendant company was bound to perform, but was the negligence of a fellow servant for which the company was not liable. In this case the *Baugh* decision (149 U. S. 368), is quoted and followed.

Engineer and Fireman of Same Train.—The engineer and fireman of the same train are fellow servants. So held in *Mulligan v. Montana U. Ry. Co.*, 19 Mont. 135, 47 Pac. 795.

Injury to Laborer—Negligence of Section Foreman and Engineer—Failure to Warn of Approach of Engine—Absence of Signals and Head Light.—In *Hastings v. Montana U. Ry. Co.*, 18 Mont. 493, 46 Pac. 264, it is held that a laborer employed by and acting under the orders of a section foreman on a railroad, who is injured through the negligence of the foreman in not warning him of the approach of a yard engine, and the negligence of the engineer of the yard engine operating his engine at dusk without using the whistle or bell and without a head light, is a fellow servant with respect to such foreman and engineer, and therefore cannot recover against the railroad company, their common master.

Negligence of Foreman of Mine—Laborer Injured by Explosion—Unexploded Blast.—But in *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633, it is held that the negligence of a foreman of a mine, as such, is that of the master rendering him liable for injury to a laborer in the mine resulting from such negligence.

In this case it is said in the opinion: "It is well settled that this foreman, having the authority to employ and discharge the plaintiff—in fact, having actually employed him and set him to work on many previous occasions, and on this very night—under such circumstances the negligence of the foreman would be the negligence of the defendant corporation." In this case it appeared that the plaintiff was a laborer in the mine; that it was his duty to go on shift at night, and work at removing material thrown down by the miners during the

Note

day. On the night of the accident he went to work as usual, and in performing his labor an explosion took place. It did not appear whether from a missed charge or a piece of power accidentally dropped among debris in which plaintiff was working. This case is followed in *Berg v. Boston & M. C. C. & S. M. Co.*, 12 Mont. 212, 29 Pac. 545.

NEBRASKA.

Here the Ohio rule, without restriction or modification, is supported by some of the decisions, but from an examination of the later decisions, it seems, that the Illinois modification is the doctrine now sustained by the court of last resort of this state.

In *Union P. R. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43, it is held that the most satisfactory evidence that one is, as to his coemployees, a vice principal is that his coemployees are under his supervision, his control, and subject to his orders and directions. In this case, however, the Ross case is followed.

Death of Section Hand—Negligence of Conductor of Construction Train—Hands Ordered to Work in Cut When Another Train Due.—In *Chicago, St. Paul, etc., Ry. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198, it is held that, a conductor of a construction train, with a gang of men hired to act as day laborers for the railroad company, but under the immediate orders of such conductor, is, as to such hands, the vice principal of the railroad and not a fellow servant of such hands; and an act of gross negligence on the part of such conductor in ordering them to work in a cut when a train was about due, whereby the lives of the hands are endangered while working under his immediate orders and direction, and one of them is killed, is the negligence of the railroad company.

Injury to Hand—Negligence of Conductor of Gravel Train.—The conductor of a gravel train, with a gang of railroad hands under his immediate control, is as to such hands, the vice principal of the railroad company, and not a fellow servant of the hands. So held in *Burlington & Mo. R. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921.

Injury to Member of Repairing Gang—Control of Foreman—Transporting to and from Work on Hand Car.—A gang of men under the control of a foreman engaged in the business of repairing bridges, water tanks, and telegraph lines along a line of railway, in going to and from their labor on a hand car on such railway, are under the control of such foreman, and his principal is liable for his negligence occurring in the course of his employment. So held in *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775, 36 N. W. 285.

Injury to Brakeman—Negligence of Conductor of Freight Train.—In *Clark v. Hughes*, 51 Neb. 780, 71 N. W. 776, it is held that a conductor in charge of a freight train, sustains towards its brakeman the relation of vice principal, and towards them his negligence in the line of his duty is, presumably, the negligence of the railroad company.

Injury to Section Hand—Negligent Order of Foreman—Absence of Authority to Hire and Discharge.—In *Union Pac. R. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43, it appeared that defendant in error was a section hand in the employ of the railroad company; that he and others were hired by one C., a section boss in the employ of the company, and that they were under his control and direction while working on their part of the railway, and C. had authority to discharge the men hired by him; that C. and his section men were put to work on a gravel train of the railway company; that this train, its crew, and all the men working thereon, including C. and his section men, while at work with the gravel train, were under the control, direction, and subject to the orders of a foreman named Forest. The latter was not invested with authority to hire and discharge plaintiff. The latter, while working on this gravel train, was injured, as he alleged, through the negligence of an order given by Forest. It was held that as to plaintiff, Forest was not a fellow servant, but a vice principal.

Note

Injury to Laborer—Dangerous Order—Negligence of Foreman.—In *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294, it is held that where a foreman directs one of the laborers under his control to perform certain work, in such manner and under such circumstances as to subject him to great danger of injury, the common master cannot shield itself from liability for damages under such circumstances caused directly to such laborer by the negligent order of the foreman, upon the ground that the only negligence imputable to the foreman consisted in the performance of an act of mere manual labor in setting in motion the agency which caused the injury, and that thereby the foreman, as to such act, was reduced to the grade of a coservant of the injured employee.

Superior Servant a Vice Principal.—In *Missouri P. R. Co. v. Lyons*, 54 Neb. 633, 75 N. W. 31, it is said in the opinion: "Smith v. Sioux City & P. R. Co., 15 Neb. 583, 19 N. W. 638; *Chicago St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198; *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921; *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb. 553, 67 N. W. 447; *Union P. R. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43, were all cases in which the master was held liable for the injury to one servant which resulted from the negligence of a coservant. But in these cases, and each of them, the offending servant sustained to the injured one the relation of vice principal and was invested with the right of control and direction not only of the work in hand but of the injured servant."

OHIO RULE QUOTED AND APPROVED.

In *Chicago, St. P., etc., Ry. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198, it is said in the opinion: "While I had supposed the law to be pretty well settled on this subject, the earnest claim of counsel at the hearing almost induced me to doubt whether the rule as formerly held in Ohio had not been departed from or essentially modified even in that state. But I find upon examination that such is not the case, and that which is held in the case of *Little Miami R. Co. v. John Stevens*, 20 O. 415, in 1851, is substantially held in all the cases up to and including *Railway v. Lavally*, 36 Ohio St. 221, in 1880. I think the rule is best stated by Judge Ranny in the case of *Railroad Co. v. Keary*, 3 O. St. 201, in the following language: 'It seems to us clear in a case like the present, that as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise, the one resting on the company, and the other upon the servants, and both founded upon what each, either expressly or impliedly, has agreed to do in the execution of the contract. It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to these servants, to control it and then with prudence and care. As the necessity of this prudence and care is constant and continuing the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they in effect warrant his fidelity and good conduct. It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they do. In such case there is no failure of the company what as between them and these servants it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employers gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to pre-

Note

vent such consequences.' I think the law thus established and laid down in Ohio prevails substantially throughout the Western States and will ultimately prevail everywhere."

Authority to Hire and Discharge Not the Test.—In *Union Pac. Ry. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43, it is held that the fact that one employee is vested with authority to hire and discharge a coemployee is not conclusive evidence that, as to such coemployee, he is a vice principal; nor does it follow that one employee is not a vice principal because not vested with the authority to hire and discharge them.

NEW HAMPSHIRE.

The limitation has never been adopted, as a rule of the common law, in this state. See *Hanley v. Grand Trunk Ry. Co.*, 62 N. H. 274; *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 52 Atl. 545; *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014; *Fournier v. Columbian, etc., Company*, 70 N. H. 629, 44 Atl. 104; *Fifield v. Railroad*, 42 N. H. 225.

In *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552, it is held that who are fellow servants, within the rule exempting the common master from the consequences of the negligence of fellow servants, is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of; that as a general rule, those doing the work of a servant are fellow servants, whatever their grade of service, and a servant of whatever rank, charged with the performance of the master's duty towards his servant, is as to the discharge of that duty, a vice principal, for whose acts and neglects the master is responsible.

In *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014, it is held that a master is not liable to his servant for an injury resulting from improper directions by a foreman in charge, if such orders were given in the execution of work properly delegable to an employee, as a detail of the service, and did not pertain to a duty which the master was personally bound to perform.

NEW JERSEY.

Here the limitation finds no support in the decisions of the courts of last resort. See *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677; *Gilmore v. Oxford Iron & Nail Co.*, 55 N. J. L. 39, 25 Atl. 707.

Rationale of Doctrine.—In *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324, it is said in the opinion: Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of work. Neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be entrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss or foreman, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect in the precise position of his other fellow servants."

Fall of Frame—Failure of Foreman to Properly Brace.—In *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677, it appeared that a laborer was taken from his special work, and with

Note

others, directed by their foreman to raise by hand a large frame; and that through lack of bracing or fastening, the frame fell and injured him. It was held that such foreman was a fellow servant of the injured employee, and that his negligent use of or failure to use proper appliances provided by the master did not render the master liable.

Injury to Miner—Negligence of Person Authorized to Direct Where to Drill Blast Holes—Power to Hire and Discharge.—A company working a mine through a general superintendent, is not liable for an injury to a minor occasioned by the negligence of a person employed to point out to the miners the places where holes were to be drilled, and who had authority to hire and discharge workmen. So held in *Gilmore v. Oxford Iron & Nail Co.*, 55 N. J. L. 39, 25 Atl. 707.

Negligence of Foreman in Executing Work Designed and Directed by Vice Principal.—In *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324, it is held that a master will not be liable to an employee for injuries sustained through the negligence of a superior servant, who is also employed as a boss or foreman of the other hands with whom he works, in the execution of work designed and directed by the master or his vice principal.

NEW MEXICO.

Here the decisions are in line with the weight of authority on this question. See *Atchison, T. & S. F. Ry. Co. v. Martin*, 7 N. Mex. 158, 34 Pac. 536; *Deserant v. Cerrillos Coal R. Co.*, 9 N. Mex. 495, 55 Pac. 290.

Injury to Section Hand Going to Work on Hand Car—Collision—Foreman with Authority to Recommend Discharge.—In *Atchison, T. & S. F. Ry. Co. v. Martin*, 7 N. Mex. 158, 34 Pac. 536, it appeared that plaintiff, a section hand, with the foreman of the section gang and another laborer were going to their work earlier than usual, on a hand car, of their own volition, to aid in repairing the railway; that plaintiff took his position upon the hand car in such a way as to have his face looking south, but was ordered by the foreman to turn and look north, who said that a train was coming out of A., that he would lookout for trains; that there was upon the line of defendant's road, at the time of the accident, a work train engaged in repairing the road, under the management and control of a conductor and engineer, upon which was a road master, who had control of the line of the road where the accident occurred; that the work train, shortly after the hand car, left the station A. for the north, and overtook the hand car, running into it, knocking it from the track, and seriously injuring plaintiff; that the work train was running on telegraphic orders that "every man at work on the track must bear in mind that in operating the road under telegraphic orders, a train may pass at any moment," as to which there was no intimation of negligence, and of which the foreman on the hand car knew, if not plaintiff; that the foreman hired the section men, directed when they ought to be discharged, and where they should work upon the section, and that he worked in the same way as did the men, and had nothing to do with paying them. It was held that plaintiff, and foreman of the section men, and the conductor, and engineer, of the work train, were all fellow servants, for whose negligence the common master was not responsible, the evidence not showing any negligence of a superior servant controlling their operations upon the work train and hand car, or either.

Death of Miner—Naked Light—Explosion—Fellow Servant of Pit Boss Working under Superintendent.—A pit boss of a mine, working under a superintendent who has charge of the whole property and its workings, is a fellow servant of the other employees, and the corporation is not liable for the death of an employee caused by an explosion occasioned by workmen going into a room where there is an

Note

accumulation of gas, over a danger signal, with a naked light, either by the direction of the pit boss or with him. So held in *Deserant v. Cerrillos Coal R. Co.*, 9 N. Mex. 495, 55 Pac. 290.

NEW YORK.

Here the superior servant limitation has never been adopted as a common-law rule. See *Crispin v. Babbitt*, 81 N. Y. 516; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Griffiths v. New Jersey & N. Y. R. Co.*, 25 N. Y. Supp. 812; *Hofnagle v. New York Cent., etc., R. Co.*, 55 N. Y. 608; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; *Maloney v. Vacuum Oil Co.*, 76 Hun (N. Y.) 579; *Malone v. Hathaway*, 64 N. Y. 5; *Murray v. Crimmins*, 35 N. Y. Supp. 1023; *Riley v. O'Brien*, 53 Hun (N. Y.) 147; *Robelle v. Rose*, 39 N. Y. Supp. 363; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153; *Sweeney v. Vacuum Co.*, 38 N. Y. Supp. 96; *Vitto v. Farley*, 44 N. Y. Supp. 1; *Warner v. Erie Ry. Co.*, 39 N. Y. 469; *Wooden v. Western New York & Pa. R. Co.*, 147 N. Y. 508, 42 N. E. 199; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Keenan v. New York, etc., R. Co.*, 145 N. Y. 190, 39 N. E. 711; *Brick v. Rochester, N. Y. & P. R. Co.*, 98 N. Y. 211; *Barringer v. Delaware & H. Canal Co.*, 19 Hun. (N. Y.) 216.

A servant who sustains an injury from the negligence of a superior agent engaged in the same general business, cannot hold the common employer liable, although he was under the control of the agent and could not guard against his negligence. So held in *Keenan v. New York, etc., R. Co.*, 145 N. Y. 190, 39 N. E. 711.

Negligence of Foreman—General Control and Supervision Retained by Master.—An employer is not responsible to his servant for the negligent act of a competent foreman to whom there has been no delegation of power and control of the business or a branch thereof, who is merely charged with special duties, which he performs under the direction of the master, general control and supervision being retained by the latter. So held in *Malone v. Hathaway*, 64 N. Y. 5.

Death of Hand—Derailment of Construction Train—Wheel Flanges Filled with Mud—Failure of Foreman to Keep Track in Safe Condition.—In *Brick v. Rochester, N. Y. & P. R. Co.*, 98 N. Y. 211, it appeared that deceased was one of a gang engaged in repairing a track, the use of which had been partially abandoned and fallen into decay; that a construction train, upon which deceased was riding, ran off the track, causing his death; that rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen, and so caused the accident; that such foreman had charge of the work of reconstruction and repairs; that he had charge of the train at the time of the accident, and it was his duty to see that the crossings were kept in safe condition; and that he attempted to perform this duty, but failed to do it properly. It was held that the negligence of the foreman, in causing such death was that of a fellow servant; and that the fact that the duty was imposed on such foreman of the reconstructing the entire road did not alter his relation as coemployee of deceased.

Injury to Hand—Negligence of Foreman of Carpenters—Construction of Culvert—Removal of "Center"—Fall of Arch.—L. contracted to build a culvert for defendant on its road. Defendant agreed to furnish "centers" over which the arch was to be constructed. An insufficient number of "centers" having been furnished, L. requested defendant's foreman of carpenters to take down one of the "centers" which had been used. An employee of defendant was engaged, under the direction of such foreman, in assisting to remove the center when the arch fell by reason of the mortar not having sufficiently set, and the employee was killed. It was held that the proximate cause of the accident was the negligence of L. or the foreman in removing the center; and that defendant was not liable; L. being an independ-

Note

ent contractor, and the foreman being deceased's fellow servant, with respect to such negligence. *Hofnagle v. New York Cent., etc., R. Co.*, 55 N. Y. 608.

Injury to Car Coupler—Negligence of Yard Master—Backing without Warning—Authority to Hire and Command.—In *McCosker v. Long Island R. Co.*, 84 N. Y. 77, it appeared that deceased was employed in defendant's yard to assist the yard master; that he was hired by the latter and was under his control and supervision; that while he was engaged, by the direction of the yard master, in attaching a damaged car standing on the track in the yard to another car, the yard master negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without regard to signal or warning, and in consequence deceased was crushed between the cars. It was held that the yard master, in causing the accident, was merely the fellow servant of deceased.

Injury to Brakeman—Failure of Conductor to Take Prescribed Precautions in Running Train over Dangerous Grades.—Where a rule of the railroad company requires the conductor of a train to apply for instructions and additional help, or to set off cars, before attempting to take his train over a summit with dangerous grades, if in doubt as to his ability to make the passage safely, the exercise of judgment by the conductor in determining, upon the apparent facts, not to take such extra precautions, is the mere performance of one of his ordinary duties as an employee, and does not make him the representative of the company, so as to render it liable for an injury to a brakeman on the train resulting from such omission on the part of the conductor. So held in *Wooden v. Western New York & Pa. R. Co.*, 147 N. Y. 508, 42 N. E. 199.

Injury to Section Hand—Defective Hand Car—Failure of Section Boss to Report Defect—Power to Hire and Direct.—In *Barringer v. Delaware & H. Canal Co.*, 19 Hun. (N. Y.) 216, it appeared that an employee of defendant was injured while riding on a hand car, owing to its defective condition; that B., as section boss, had charge of about five miles of track, and was foreman of the men employed to keep it in repair, hiring them, and directing their work; that he was responsible for tools and machinery, and if any were wanted, or out of repair, he applied or reported to the track master, who furnished the necessary machinery, and directed as to the necessary repairs; that if the machinery was defective, B. was ordered to have it repaired; that the track master employed the foreman of the sections, and they were subject to him; and that B. knew of the defect in the hand car, but had not notified the track master thereof. It was held that B. was not a representative of the company so as to render it liable for the injury to the employee, B.'s fellow servant.

NORTH CAROLINA.

Here the master's common-law responsibility for the negligence of a superior servant depends upon the fact whether the servant under the authority of the superior has sufficient reason to fear that a refusal on his part to obey the commands or directions of the superior will result in discharge from his employment. *Logan v. North Carolina R. Co.*, 116 N. Car. 940, 21 S. E. 959; *Patton v. Western N. Car. R. Co.*, 96 N. Car. 455, 1 S. E. 863; *Turner v. Goldsboro Lumber Co.*, 119 N. Car. 387, 26 S. E. 23; *Kirk v. Atlanta, etc., R. Co.*, 94 N. Car. 625.

Fear of Dismissal.—In *Turner v. Goldsboro Lumber Co.*, 119 N. Car. 387, 26 Atl. 23, it is held that the test of the question whether one in charge of other servants is to be regarded as a fellow servant or vice principal is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal.

Section Boss—Power to Hire, Discharge and Command.—Where a section boss has full power to hire, command and discharge those

Note

working under him, he is not their fellow servant. So held in *Logan v. North Carolina R. Co.*, 116 N. Car. 940, 21 S. E. 959.

Injury to Section Hand Ordered to Jump from Moving Train—Section Master with Authority to Hire, Discharge and Command.—

Where the common employer gives a section master authority to command, discharge, and hire section hands, the common master is liable for injury to one of such hands, sustained in obeying an order of the section master to jump from a moving train, unless recovery is prevented by the application of the doctrine of contributory negligence or assumption of risk. So held in *Patton v. Western N. Car. R. Co.*, 96 N. Car. 455, 1 S. E. 863.

Power to Hire, Discharge and Command—Character of Negligent Act Immaterial.—

Where the common master invests one of his employees with the power to hire, discharge, command and direct the other employees, the master is liable for his acts, and he is not a fellow servant, although he works as any of the other employees, and there is nothing in the nature of the employment to show an authority to charge the common master. So held in *Patton v. Western N. Car. R. Co.*, 96 N. Car. 455, 1 S. E. 863.

Authority to Command.—In *Cowles v. Richmond & Danville R. Co.*, 84 N. Car. 309, it is held that a railroad company is not responsible for an injury received by one of its employees through the negligence of a fellow servant occupying the same level with the injured employee, if due care was used in selecting such fellow servant; but the master will be liable if the injury resulted from the negligence of a servant whose commands plaintiff was bound to obey.

Conductor a Vice Principal.—A conductor in charge of a train is, as to those subject to his orders on the same train, a vice principal. So held in *Mason v. Richmond & D. R. Co.*, 114 N. Car. 718, 19 S. E. 362.

Mere Foreman.—But to impute the negligence of an agent to the master, he must be something more than a mere foreman over other hands, he must have the entire management of the business in hand, be clothed in that respect with the authority of the master, to whom the hands are put in subordination and to whom they owe the duty of obedience. So held in *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.

General Supervision of the Work Retained by Master.—And if the common master has a general supervision of the work, he is not liable for the foreman's negligence, although the injured servant is obliged to obey the foreman's orders. So held in *Kirk v. Atlanta & C. Air Line R. Co.*, 94 N. Car. 625.

NORTH DAKOTA.

Here the superior-servant limitation is not recognized as a rule of the common law.

In *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 48 N. W. 222, 12 L. R. A. 97, it is said in the opinion: "The master must use due care in supplying his servants with safe appliances, and providing them a safe place in which to work. These are duties of the master. They are none the less his duties because from the necessities of business, or for other reasons, he confides their discharge to an employee. His personal negligence in this respect would create liability. He cannot gain exemption from negligence in this regard by delegating these personal duties to another. This doctrine is sound, and it in no manner is a limitation of the fellow-servant rule. On the other hand, the other doctrine is a limitation—a very important limitation—of that rule. It finds no warrant in cases which first enunciated that rule. It rests on no subsequent legislation; and we are firm in the conviction that the mere superiority in the rank of the negligent servant—his right to control the servant injured, and to employ and discharge him—calls for no modification of the fellow-servant rule. The bed rock of that doctrine is that every employee assumes the risk of

Note

his coemployee's negligence as one of the ordinary risks of his work. Is a superintendent or foreman so much more careless in the performance of work pertaining to a servant's duties than a subordinate employee that the risk of the former's negligence is an extraordinary one? If work belonging to the duties of a servant be done carelessly, what conceivable difference is there whether the negligence proceed from a commander or a subaltern, so long as the master himself is not personally at fault. The superior servant is in fact a fellow servant. The two are engaged in the same general work for the master; one using his muscle chiefly, and the other perhaps working mainly with his brain. The only ground on which the superior's relation as fellow servant is ignored is the constructive presence in his person of the master, because the master in the distribution of labor has appointed him to work in the line of superintendence and control. But this control, this superior rank, cannot lift him above the grade of a fellow servant into the position of a vice principal so long as he is engaged in the work of a servant only. If a servant of inferior rank should perform the same work, he would not be regarded as the master; and we are at a loss to understand how the higher rank of the servant can change the nature of the act, or increase the risk of the inferior servant, so as to render inapplicable the fellow-servant rule. The superior servant is no more the representative of the master than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him. They are both laboring for a common master in the same general business; both ultimately accountable to him; and employed, controlled and discharged by him, either personally, or by some one selected by him for that purpose. The ultimate power to employ, control, and discharge is in his hands. The reason for the fellow-servant rule applies with full force to the work of a servant, whatever the rank of the servant who performs it. It would be an anonymous condition of the law if the negligence of one servant was within the ordinary risks of the employment, while the negligence of another, no more prone to carelessness, should be without the domain of such risks merely because he had been set in a higher place of service by reason of superior skill or ability. * * * We believe that the true rule was stated and applied in *Crispin v. Babbitt*, 81 N. Y. 516: "The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is in the management of the machinery a fellow servant of the other operatives. * * * The liability is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: if the act is one which pertains to the duty of an operative, the employee performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow servant for its improper performance."

Pile Shoved against Hand—Failure of Foreman to Block—Authority to Hire and Discharge.—In *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 48 N. W. 222, it is held that the negligence of the foreman of a gang in failing to block a pile which was shoved against plaintiff, because it was not blocked, was the negligence of a fellow servant, although the foreman had authority to employ and discharge plaintiff, and plaintiff was under his superintendence and control in doing the work in the performance of which he was injured.

OHIO.

This state is entitled to rank first on a list of jurisdictions in which the superior-servant limitation of the fellow-servant rule is sus-

Note

tained, because here the limitation originated, and has been consistently sustained by the decisions of the supreme court of the state ever since it was first declared to be the law in *Little Miami R. Co. v. Stevens*, 20 O. 415, and because it is the only state in which the decisions are harmonious in supporting the doctrine in its most unrestricted form.

Character of Negligent Act Immaterial.—In this jurisdiction it is held that the nature of the negligent act of the superior servant, whereby an employee under his authority is injured, is immaterial. The master is held liable whether the negligent act was one performed in exercising his delegated authority over the subordinate employee or merely in assisting the latter to perform the manual labor which it was the duty of both to engage in. *Berea Store Co. v. Kraft*, 31 O. St. 287; *Davis v. Griffith* (Cinc. Super. Ct.), 27 O. L. J. 180.

In *Pittsburgh, etc., Ry. Co. v. Ranney*, 37 O. St. 665, it is said in the opinion: "He (the master) also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow servant or not, in the ordinary sense. The superior, in his relation to the subordinate servant, is, in the language of Judge Day, in *Railroad Co. v. Lewis*, 33 Ohio St. 196, the alter ego of the master. This doctrine, which imputes to the master the negligence of a servant to whom he has delegated authority over other servants, has been firmly ingrafted in the jurisprudence of this state ever since the case of *Little Miami R. R. Co. v. Stephens*, 20 O. 416. See also, *C. C. & C. R. R. Co. v. Keary*, 3 O. St. 201; *L. S. & M. R. R. Co. v. Lavally*, 36 O. St. 221, and cases therein cited."

Injury to Engineer—Negligence of Conductor.—Where the engineer is placed under the control of the conductor, who directs when the cars are to start, stop, etc., the company is liable to the engineer for an injury occasioned by the negligence of the conductor, while they are both engaged in their respective employment. So held in *Little Miami R. Co. v. Stevens*, 20 O. 415.

Injury to Car Repairer Working under Car—Negligence in Moving Another Car—Foreman Assisting in Repairing.—In *Lake Shore, etc., Ry. Co. v. Lavelly*, 36 O. St. 221, it appeared that a foreman was placed in charge of a set of hands, whose business it was to repair freight cars standing on the tracks, in the company's yard, in which it was the custom to make up trains; that it was also the duty of foreman to participate with hands in doing the work; that while the foreman and a hand were engaged in repairing a car, and the latter was at work under the car by the order of the foreman, he was injured by the striking of the car on which he was working by another car moving on the same track. It was held that the hand was the subordinate of the foreman, in respect to the work in which he was engaged at the time he was injured; and the master was responsible to former for the foreman's negligence.

Negligence of Foreman in Performing Manual Labor.—An employer is liable for an injury to his servant resulting from the negligence of a superior servant, while the latter is discharging the duties of one under his control, to the same extent as if the act causing the injury had been committed by an inferior servant under his directions. So held in *Berea Stone Co. v. Kraft*, 31 O. St. 287.

Injury to Hand Riding to Work on Gravel Train—Negligence of Engineer.—But in *Krumler v. Junction R. Co.*, 33 O. St. 150, it appeared that a railroad company, engaged in ballasting its road, employed a hand to assist in loading and unloading a gravel train, and that it was necessary for him to ride on the train from the gravel pit to the place of unloading; and that the train was run under the direction of a conductor; and that the hand had nothing to do with its management. It was held that such hand, while riding on the train,

Note

was a mere employee and that, as he was not under the control or subject to the order of the engineer, the railroad could not be held liable for negligence of the engineer, resulting in his death, if it was not negligent in selecting the engineer.

Injury to Brakeman—Parting of Train—Conductor on Other Section—Affect on Superiority or Control.—And where the conductor of a train is in control of it and the other employees thereon, in the absence of rules or proof of express authority to the contrary, he is not deposed from such control by the accidental parting of the train en route, nor is the engineer thereby made the superior in direction and control of a brakeman who happens to be with him on a section of such divided train. So held in *Cleveland, etc., Ry. Co. v. Shanower* (Ohio), 13 R. R. R. 147, 36 Am. & Eng. R. Cas., N. S., 147, 71 N. E. 279.

Brakeman Required to Operate Brakes "According to Circumstances and Signals of Engineman."—So where an engineer and brakeman were employed by a railroad company in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engineer, other than what may be implied from the rules of the company, requiring the engineer to give certain specified signals as "a notice" to apply or loosen the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engineman," and placing the brakeman, while on the train, in subordination to the conductor, it was held that the relation of superior and subordinate did not exist between the engineer and brakeman. *Pittsburgh, F. W. & C. Ry. Co. v. Lewis*, 33 O. St. 196.

Where, by the rules of a railroad company, brakemen on a train are placed under the control and direction of the conductor, the relation of superior and subordinate, as between the engineer and a brakeman, is not created by a rule of the company requiring the engineer to give certain signals for setting or relieving brakes and also requiring brakemen to work the brakes accordingly. So held in *Pittsburgh, etc., Ry. Co. v. Ranney*, 37 O. St. 665.

Engineer Superior of Fireman—Construction of Statute.—An engineer in charge of a locomotive, who has authority to direct or control a fireman serving on the same engine, is a "superior" within the meaning of section 3, of the act of April 1, 1890, 82 Ohio Laws 150. So held in *Railroad Co. v. Margrat*, 51 O. St. 130, 37 N. E. 11.

OREGON.

No support is found in the decisions of the supreme court of this state for the doctrine embodied in the superior servant limitation of the fellow-servant rule. See *Brunell v. Southern Pac. Co.*, 34 Ore. 257, 56 Pac. 129; *Johnson v. Portland Stone Co.*, 40 Ore. 436, 67 Pac. 1013; *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950.

Character of Negligent Act the Test.—The rule is now established in Oregon that in determining whether two persons were or were not fellow servants the character of the act causing the injury, and not the grade of the negligent employee, is the test. So held in *Brunell v. Southern Pac. Co.* 34 Ore. 256, 56 Pac. 129.

Substantial Control of Business and Power to Do All Necessary Acts.—In *Willis v. Oregon Ry. & N. Co.*, 11 Ore. 257, 4 Pac. 121, it is said in the opinion: "To constitute one vice principal or superior servant, the master must have committed to him the substantial control of the business and the power to do all acts necessary to its conduct. (*Peterson v. Whitebreast Coal Co.*, 50 Iowa 673; *Cocoran v. Holbrook*, 59 N. Y. 517; *Lanning v. N. Y. R. Co.*, 49 N. Y. 521; *Sherman and Redfield on Neg.*, sec. 102.)"

Manager of Quarry—Hand Ordered to Put in Blast before Hole Had Cooled.—The negligence of the superintendent and manager of a quarry, having power to hire and discharge employees, in directing workmen, with whom he is engaged in blasting, to put powder in a

Note

hole, without waiting a sufficient time for the hole to cool after giant powder had been exploded therein, for the purpose of drying it, is that of a fellow servant, and not of a vice principal. So held in *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950.

Quarry Hands—Hand Assuming Lead, and Directing.—Servants who work together in a quarry drilling holes for blasts and loading them with powder are fellow servants, though one takes the lead and gives directions, so his negligence is a risk assumed by the others. So held in *Johnson v. Portland Store Co.*, 40 Ore. 436, 67 Pac. 1013. In this case it appeared that the servant taking the lead and giving directions, was the powder man, but had no control over the injured employee except when the latter was assisting him in loading the holes, and then only to direct him what to do.

Negligence of Foreman of Gang Erecting Shed.—In *Willis v. Oregon Ry. & N. Co.*, 11 Ore. 257, 4 Pac. 121, it is held that the foreman of a gang of laborers engaged in erecting a shed under the direction of a superior is a fellow servant of the hands under him, and if one of them is injured through his negligence, the common master is not liable.

Negligence of Foreman in Ordering Hand to Work Where Blasts Had Failed to Explode.—Where a foreman ordered a hand under him to set up machinery and drill holes at the place where the injury to the latter occurred, without having taken any care, or at least, adopted some precautionary measures to discover whether there were holes charged with giant powder which had failed to explode, and to guard against the danger of the drills penetrating them, etc., he committed a negligent act, for which the common master was liable. So held in *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765.

Nonassignable Duties.—In *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765, it is said in the opinion: "The master is chargeable for any act of negligence, in so far as such servant (a foreman) is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and appliances, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils, which may be guarded against by proper diligence, etc., and to the extent of the discharge of these duties which the master owes to his servants by the middleman or vice principal, the latter stands in the place of the master."

PENNSYLVANIA.

In this state the limitation has never acquired a foothold, even in a modified form. See *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157; *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. 141; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 40 Atl. 88; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *Shea v. Pennsylvania R. Co. (Pa.)*, 13 Atl. 193; *Caldwell v. Brown*, 53 Pa. St. 453; *Duffy v. Oliver*, 131 Pa. St. 203, 18 Atl. 872; *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162, 33 Atl. 1102; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577; *McCool v. Coal Co.*, 150 Pa. St. 638, 24 Atl. 350; *McGinley v. Levering*, 152 Pa. St. 366, 25 Atl. 824; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364, 8 Atl. 593; *Reese v. Biddle*, 112 Pa. St. 72, 3 Atl. 813; *Waddell v. Simoson*, 112 Pa. St. 567, 4 Atl. 725; *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460.

It is the settled law in Pennsylvania that a fellow servant is anyone serving the same master, and under his control, whether equal, inferior, or superior to the person injured by his negligence in his grade or standing, and the fact that the injured servant was under the negligent employee's control is immaterial. So held in *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432.

Master Only Responsible for Negligence of Foreman in Discharging Nonassignable Duties.—It is the duty of the master to provide his servants with suitable places to work, with suitable tools and ma-

Note

chinery to use in doing their work, and with reasonably competent fellow laborers with whom to work; and also to instruct the young and inexperienced laborer in the use of the tools and machinery, and as to the dangers peculiar thereto. And a vice principal is one to whom the master delegates the performance of these duties, or a part of them, and therein represents the master, so that his acts are the acts of the master; but, except when and so far as a foreman is in discharge of these duties, due from the employer to his employees, he acts as a mere workman, and not as a vice principal. Therefore when it is sought to hold a master liable to a servant for the negligent act of a foreman, it must first be considered whether the negligence alleged relates to anything which it was the master's duty to do; if it does, he is liable; but if not, and the foreman selected is reasonably competent, he is not liable. So held in *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157.

Gang Boss Working under Orders of Superintendent.—If a gang boss has no general power of control, but acts as foreman of workmen furnished to him by the superintendent of a company, whose orders he is bound to obey, he is not such a representative of the company as that it would be, liable for his negligence causing injury to a hand under him. So held in *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246.

Foreman Ordering Use of Defective Chain.—A railroad hand, injured by the breaking of a chain which the foreman of the gang required them to use when he knew it was defective, cannot recover against the railroad, as the negligence was that of the foreman, the injured employee's fellow servant. So held in *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. 141.

Superior and Inferior Co-Operating.—Employees may be fellow servants, although the one injured is inferior in grade and subject to the control and direction of the superior whose act causes the injury, providing they are both co-operating to effect the common object. So held in *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

Mere Selection of Materials Furnished.—It is not the duty of the master, after having provided materials ample in quantity and quality for the work his servants are engaged in, to supervise the selection of every piece of material for every purpose; and his foreman, in making such selection, does not represent the master as a vice principal. And in such case, it is not material whether the person who did the negligent act had entire control of the work or not; whether he, as a foreman, selected from the mass the materials to be used for any particular purpose or not, or whether hired or discharged the men or not; his act was but that of a fellow servant. So held in *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157.

Injury to Track Hand—Failure of Boss to Warn of Approach of Train.—A laborer working on a railroad track is the fellow servant of the boss of his gang, and there can be no recovery against the railroad company for his death, where it resulted from the failure of such boss to warn him of the approach of the train by which he was killed. So held in *Shea v. Pennsylvania R. Co. (Pa.)*, 13 Atl. 193.

Vice Principal Acting under Express Orders.—Where the master himself assumes control and gives an express order not only what to do, but how to do it, even a vice principal is bound to obey, and becomes for the time being a mere coemployee, whatever his general authority may be under other circumstances, and the employer is not bound personally to supervise the doing of the work, but is entitled to assume that his orders will be obeyed. So held in *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 40 Atl. 88.

Entire Charge of Distinct Department.—But where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is liable for the negligence of such agent or subordinate. So held in *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514.

Note

In *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 40 Atl. 88, it is held that a vice principal for whose negligence a master will be liable to his other employees, must be either one in whom the master has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work or certain workmen, but control of the business, and exercising no discretion or supervision of his own, or, one to whom he delegates a duty of his own which is a direct, personal and absolute obligation, from which nothing but performance can relieve him.

RHODE ISLAND.

Here the limitation has never been favored. See *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 515, 27 Atl. 328; *Larich v. Moies*, 18 R. I. 513, 28 Atl. 661; *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659.

Character of Negligent Act the Criterion of Responsibility.—In *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 514, 28 Atl. 661, it is said in the opinion: "As held in *Hanna v. Granger*, 28 Atl. 659, and in *Larich v. Moies*, Id. 661, a servant stands in the place of a principal only when some duty or power which pertains to a principal, and which is an element in causing the injury complained of, is delegated to him; as to all other matters, he is a coservant. The character of the act is the criterion of liability, and not the foreman's power of supervision and control, or of hiring and discharging help."

Authority to Hire and Discharge Makes Foreman a Vice Principal Only with Respect to Selecting or Retaining Servants.—In *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659, it is said in the opinion: "Undoubtedly the power to hire and discharge is the test of a vice principal when the question involved is that of selecting or retaining proper servants; for in this respect the servant would clearly represent the master. But in no other sense is it a test. The power to summarily discharge unworthy servants and to hire new ones is often a very necessary and beneficial power for the safety of other servants, for it gives a foreman authority to compel attention to duty. But it does not change the character of the foreman's duties from that of a servant to those of the principal, nor does it impose upon him the master's responsibility in other respects. And this brings us to the true statement of the rule as we understand it, which is that a servant is a vice principal only when he stands in place of the principal with reference to the principal's duty, or in the exercise of the principal's functions. Anything beyond this is inconsistent with the well settled rule of the master's duty. It adds to and alters it in ways that cannot be foreseen nor guarded against, and makes a master liable, however great may have been his care and diligence in selecting his servants."

Injury to Flagman of Steam Roller—Negligence of Foreman in Frightening Team.—In *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659, it appeared that a flagman to a steam roller used in repairing streets, who was subject to the orders of the engineer of the roller, and liable to discharge by him, was injured in the course of their common employment through the carelessness of the engineer in suddenly and without warning starting the roller with great noise so that a span of horses became frightened and ran upon and injured the flagman. It was held that the flagman and engineer were fellow servants; and that the city, their common master, was not liable for the injury.

Negligence of Foreman in Throwing Box on Pile of Posts.—The negligence of a foreman in throwing a box upon a pile of iron posts which causes injury to a hand under him, is the act of a fellow servant for which the common master is not responsible. So held in *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328.

Injury to Fireman—Ordered by Engineer outside Scope of Employment.—But in *Mann v. Oriental Print Works*, 11 R. I. 152, it appeared that a fireman employed to tend an engine fire was called upon

Note

by the engineer to assist in throwing on a belt which worked a pump used to fill a boiler; and that the fireman was injured by the belt. It was held that if the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him called upon suddenly to assist in throwing on a belt, out of his own sphere of employment, but within that of the engineer, and was thus subjected to a risk with which he was not acquainted, or of a peculiar and greater risk at that time, and of which he was not informed or cautioned, the common master would be liable.

SOUTH CAROLINA.

In this state the common-law decisions do not seem to be reconcilable. However, we think it will be found from a review of the cases, that the court of last resort favors the view that the master is not liable for the negligence of a superior servant, except in performing a personal duty of the master to the injured employee. See *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262; *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526. Now, however, this question is governed by a provision of the constitution of 1895.

In *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262, it is said in the opinion: "The test as to whether an employee is the representative of the master is, not whether such employee has the power to employ and discharge hands, or to purchase or change machinery, are some of the duties of the master, they are not all of his duties, and hence, an employee who is not entrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as the fellow servant or colaborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master."

Cotton Factory—Duty to Hire, and Discharge, and to Provide and Maintain Machinery.—A master is liable for an injury to his servant caused by the negligence of the person employed to discharge any duty the master owes to his servant; and one charged with the duty of employing and discharging operators in a cotton factory, to provide suitable machinery, and to keep it in repair, is the master's representative. So held in *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262.

Negligence of Conductor of Material Train in Readjusting Switch.—The conductor of a material train, in discharging his duty of readjusting a switch, is not the fellow servant of a laborer on his train, but is a representative of the master and his failure to properly perform such duty is the failure of the master to keep the track in safe condition. So held in *Coleman v. Wilmington, etc., R. Co.*, 25 S. Car. 446. This, however, seems to be a misapplication of the rule.

Ross Case Followed—Conductor Not Fellow Servant of Flagman of His Train.—A conductor represents the master with respect to a flagman on his own train. So held in *Hicks v. Southern Ry.*, 63 S. Car. 559, 41 S. E. 753. This case, however, merely adopts the now generally repudiated doctrine of the Ross Case.

TENNESSEE.

In this jurisdiction, though the decisions do not seem to be altogether harmonious, the weight of authority supports the Illinois doctrine, that the injury to the inferior servant, to render the master responsible, must be the result of the exercise of the authority conferred upon the superior employee. *Railroad v. Spence*, 93 Tenn. 173, 23 S. W. 211; *Railroad Co. v. Bolton*, 99 Tenn. 273, 41 S. W. 442; *Ohio River & Ry. Co. v. Edwards* (Tenn.), 10 R. R. R. 403, 33 Am. & Eng. R. Cas., N. S., 403, 76 S. W. 897; *Iron Co. v. Dobson*, 7 Lea (Tenn.) 377; *Railroad Co. v. Wheless*, 10 Lea (Tenn.) 423; *Bradley v. Railroad Co.*, 14 Lea (Tenn.) 374; *Louisville, etc., R. Co. v. Lahr*, 86 Tenn.

Note

335, 6 S. W. 663; Nashville, etc., Ry. *v.* Handman, 81 Tenn. 425; Louisville, etc., R. Co. *v.* Martin, 87 Tenn. 398, 10 S. W. 772.

In *Railroad v. Spence*, 93 Tenn. 173, 23 S. W. 211, it is said in the opinion: "A servant who is in a position of authority over the subordinate servant, is not, in the sense of the law, a fellow servant in a common employment, but represents the master, who is liable for his negligence. The reason for this rule, stated by Judge McFarland, in *Railroad v. Wheless*, 10 Lea 746, is based, not upon the idea of the relative rank of the servants or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and directions of the other, and required to submit to and obey such orders in the performance of his duties; that the inferior is placed in the position of a servant to the superior. In such cases the superior is held to represent the master."

Nonexercise of Authority to Give Orders.—In *Ohio River & C. Ry. Co. v. Edwards* (Tenn.), 76 S. W. 897, 10 R. R. R. 403, 33 Am. & Eng. R. Cas., N. S., 403, it is said in the opinion: "The subject is farther illustrated by the cases which hold that although one may be a vice principal *pro tem.*, so to speak, and has power to give orders to those who are under him for the time being, yet he is not really a vice principal as to matters occurring during that time unless he in fact gives orders to subordinates, and they act thereunder. This is illustrated by the case of an engineer, who is vice principal in the absence of the conductor, and has control of the train, yet, when he in fact gives no orders, but both he and the brakeman employed upon the train follow out their regular line of duties, previously given by the conductor, in such a case the engineer is not in fact, as to things done, the vice principal of the brakeman, but only a fellow servant, and the company would not be liable, for his negligence, to such fellow servant."

Brakeman and Engineer—Absence of Conductor—Authority Not Assumed by Engineer.—In *Louisville, etc., R. Co. v. Martin*, 87 Tenn. 398, 10 S. W. 772, it is held that the engineer is the fellow servant, and not the superior, of a brakeman of his train, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the company in such emergency. If the engineer does not assume authority over the brakeman, though he has the right to do so.

Engineer and Brakeman—Acting under Orders.—The engineer is not the superior, but the fellow servant, of the brakeman in their relations as members of a train crew; but the relation of superior and inferior would exist between them where the brakeman is acting under the orders of the engineer. So held in *Nashville, etc., R. Co. v. Wheless*, 78 Tenn. 741.

Conductor and Fireman of Freight Train—Authority to Direct and Control.—A conductor in charge of a freight train, with authority to direct and control its movements, bears the relation of vice principal, not of a fellow servant, to the fireman of the train. So held in *Railroad v. Spence*, 93 Tenn. 173, 23 S. W. 211.

Injury to Hand—Negligence of Section Boss—Order to Board Moving Car.—A section boss or track foreman stands in the relation of vice principal to one of a gang of track hands under his orders. So held in *Chattanooga Elec. Ry Co. v. Lawson* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669. In this case it appeared that it was the duty of such section boss to control the train, and he was acting as conductor and motorman when he ordered plaintiff to board a train of flat cars moving up grade at the rate of three or four miles an hour.

Foreman with Mere Authority to Send to Appointed Tasks and to Recall from Work.—But the case of *Knox v. Railroad Co.*, 101 Tenn. 375, 47 S. W. 491, introduces a distinction applying to those cases wherein the special duties to be performed both by the foreman and

Note

his coemployees are plainly laid down by the master, and the foreman merely sends those associated with him to the performance of their previously appointed tasks, and notifies them to desist, thus having and exhibiting practically no authority.

Held Only Responsible for Superior Servant's Negligence in Discharging Master's Duties, or Consequences of Superior's Direct Order in Sudden Emergency.—The fellow-servant rule applies where the injury results from the negligence of another employee who is the immediate superior of the injured employee, unless the superior servant so far stands in the place of the master as to be charged, in the particular matter, with the performance of a duty to the inferior which under the law, the master owes to the inferior, or unless the injury is occasioned by the direct order of the superior in a sudden exigency. So held in Nashville, etc., Ry. v. Handman, 81 Tenn. 425.

Tennessee Decisions Reviewed—Power to Hire and Discharge.—In *Ohio River & Ry. Co. v. Edwards* (Tenn.), 76 S. W. 897, 10 R. R. R. 403, 33 Am. & Eng. R. Cas., N. S., 403, it is said in the opinion: "It should be first observed that the mere superiority in dignity, grade, or compensation, in favor of one servant of a common principal over other servants, is not a mark by which to distinguish whether or not the former is a vice principal. * * * The most general test is that, in order to be a vice principal, a servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty towards the inferior which under the law, the master owes to such servant—as furnishing tool * * *, or machinery and appliances * * *, or giving orders with respect to work to be done by the subordinate (*R. Co. v. Handman*, 13 Lea 423, 429).

"A test frequently stated in our cases is the authority to give orders, as a vice principal, to the subordinate servant, in directing him when, where, and how to work. *Iron Co. v. Dobson*, 7 Lea 377, 378; *R. Co. v. Wheless*, 10 Lea 741, 746; *Bradley v. R. Co.*, 14 Lea 374, 379, 380; *Louisville, etc., R. Co. v. Lahr*, 86 Tenn. 335, 337, 340, 342, 6 S. W. 663; *Coal Creek Mining Co. v. Davis*, 90 Tenn. 711, 717, 719, 18 S. W. 387, 16 L. R. A. 268; *Railroad v. Kenley*, 92 Tenn. 207, 210, 211, 21 S. W. 326; *Electric Ry. Co. v. Lawson*, 101 Tenn. 406, 409, 410, 47 S. W. 489; *Railroad Co. v. Jones*, 9 Heisk. 33. In some of these cases, and in others to be subsequently cited, a distinction is taken between one who has authority, derived from the principal, to give orders to subordinates and a mere foreman without such authority, the latter being held not to be a vice principal. In some of these cases it is indicated that in addition to the power to give orders is included the power to employ and discharge. *Knox v. Southern Ry. Co.*, 101 Tenn. 375, 47 S. W. 491; *Gann v. R. Co.*, 101 Tenn. 380, 381, 47 S. W. 493, 70 Am. St. Rep. 687; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 19, 49 S. W. 832. In one case the test is indicated as the power to employ and direct. *R. R. v. Bowler*, 9 Heisk. 866. In these cases, however, no stress is laid upon the element embraced in the power to employ and discharge. These features are merely mentioned incidently."

"We are of the opinion, therefore, that the real test is that one which we first stated, and of which the second is a constituent part, and that no stress should be laid upon the power to employ and discharge, although when these powers exist, they add strength and dignity to the position of the vice principal."

Master Not Liable for Negligence of Superior in Working as Co-laborer.—See *Illinois Cent. R. Co. v. Bolton*, 99 Tenn. 273, 41 S. W. 442; *Ohio River & C. Ry. Co. v. Edwards* (Tenn.), 10 R. R. R. 403, 33 Am. & Eng. R. Cas., N. S., 403, 76 S. W. 897; *Louisville & Nashville R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663.

In *Illinois Cent. R. Co. v. Bolton* (Tenn.), 9 Am. & Eng. R. Cas., N. S., 868, it is said in the opinion: "It is apparent that one may be

Note

the general representative of the master, so as to charge the latter with the results of negligence occurring within the scope of his employment, and yet he may abandon his position with the authority attached to it, and become a fellow servant of those engaged in doing the work in hand, and on a plane of perfect equality with them. In the one case the master would be responsible for his negligence, and in the other we think he would not be."

Master Not Liable for Mere Personal Negligence of Superior Servant.—In *Louisville & Nashville R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663, it is held that the master is not responsible for the mere personal negligence of a superior, causing injury to an inferior fellow servant. In order to render the master liable for the consequences of the superior servant's negligence, the latter must so far stand in the place of the master as to be charged, in the particular matter from which the injury results to the inferior servant, with the performance of some duty which, under the law, the master owes such servant.

Injury to Section Hand—Negligence of Foreman Performing Manual Labor.—In *Railroad Co. v. Bolton*, 99 Tenn. 273, 41 S. W. 442, it is held that the common master is not liable for an injury to a section hand caused by the negligence of the temporary section foreman while the latter was engaged as a laborer in a common work with the foreman; as the negligence was that of a fellow servant.

Negligence of Subforeman—Collision between Lever Car and Dump Car—Authority to Direct When, Where, and How to Work Not Shown.—In *Ohio River & C. Ry. Co. v. Edwards* (Tenn.), 76 S. W. 897, 10 R. R. R. 403, 33 Am. & Eng. R. Cas., N. S., 403, it appeared that the subforeman of a section crew, pursuant to the direction of the foreman, took three members of the crew to bring a lever car from up the track. Arriving at the place, he signaled an employee of a lumber company, having a dump car, to wait until he got the lever car on the track ahead of it. Then one of the crews sat on the lever car, propelled by all the other persons, and drew the dump car with a cant hook. When they got where the dump car was to stop the subforeman applied the brake on the lever car, and the dump car from which the cant hook had become detached struck the lever car, throwing one of the crew off. It was held that the negligence of the foreman was that of a fellow servant and not of a vice principal; it not being shown that the master had placed any of his servants under him and conferred on him authority to direct when, where and how to work, or that the master had imposed on him the duty of furnishing tools or machinery, or the performance of any other duty towards the servants which the master owed them, and the duties of the foreman not being shown.

Fall from Trestle—Failure of Foreman of Construction Gang to Properly Secure—Personal Negligence.—In *Louisville & Nashville R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663, it appeared that plaintiff was injured by a fall from a railroad trestle while in defendant's employ; that he was working on the trestle under a foreman; that desiring to descend from an upper to a lower bent of the trestle, he caught a hanging rope, which the foreman by mistake had not properly fastened above and proceeded to let himself down, and he fell to the ground; and that there were other ropes, which the hands were accustomed to use to descend. There was no proof that plaintiff was ordered to descend, or that the foreman knew he intended to do so, or that any duty was assumed by or imposed upon the foreman to provide safe means of descent by the ropes. It was held that the negligence, if any, resulted from personal negligence of the foreman, for which the master was not liable.

Death of Fireman from Explosion of Boiler—Violation of Rule—Failure of Engineer to Be on Hand.—Where the fireman was killed by the explosion of the boiler while the engine was standing on the

Note

track ready to start with a train of cars, and the engineer failed to be present thirty minutes before the time of the accident, as required by a rule of the railroad, it was error to charge that if it was found that such failure to comply with the rule was the proximate cause of the accident, then the company was liable for the death of the fireman. So held in *Nashville, etc., Ry. Co. v. Handman*, 81 Tenn. 425.

TEXAS. •

In this state the test as to whether an employee is the superior of one under his authority, so as to render the master liable for an injury to the latter resulting from the negligence of the superior, is whether the latter had power to control and authority to employ and discharge the injured servant. *Texas, etc., R. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Ft. Worth, etc., R. Co. v. Peters*, 87 Tex. 222, 27 S. W. 257; *Connor v. Saunders*, 9 Tex. Civ. App. 56, 29 S. W. 1140; *Douglas v. Texas Mexican Ry. Co.*, 63 Tex. 564; *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835; *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473, 18 S. W. 571; *Sweeney v. Gulf, C. & S. F. Ry. Co.*, 84 Tex. 433, 19 S. W. 555; *Texas Cent. R. Co. v. Frazier*, 90 Tex. 33, 36 S. W. 432, 4 Am. & Eng. R. Cas., N. S., 664; *Austin Rapid Transit R. Co. v. Grothe*, 88 Tex. 262, 31 S. W. 196; *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486; *St. Louis A. & T. Ry. Co. v. Lemon*, 83 Tex. 143, 18 S. W. 331; *Missouri Pac. Ry. Co. v. Lasse* (Tex. Civ. App.), 22 S. W. 187; *International & G. N. Ry. Co. v. Hinzie*, 82 Tex. 623, 18 S. W. 681; *Gulf, C. & S. F. R. Co. v. Wells* (Tex.), 16 S. W. 1025.

In *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835, it is said in the opinion: "A servant who has the authority to employ other servants under his immediate supervision exercises an important function of his master, and has as full control over them as the master would have were he present, acting in person. The subordinate in such a case is in fact as much the servant of the agent who employs and controls him, as he would be of the master were the latter discharging the functions of his agent. It would seem, therefore, that there is as much reason for holding that a servant assumes the risk of the master's negligence, as of holding that he assumes the risk of the negligence of such a superior employee of his master."

Authority to Employ and Discharge.—It is well settled that when a superintendent, agent or foreman is authorized to select, employ and discharge the servants that work under him, he is bound to exercise the same care in protecting them from injury as is imposed upon the master, and for any failure in this respect resulting in injury to one of such employees, the common master is responsible. So held in *Douglas v. Texas Mexican Ry. Co.*, 63 Tex. 564.

The doctrine that the common master is responsible for the acts of a vice principal applies to any special business of the master which is carried on by a number of employees under charge of another with power to employ and discharge the servants employed in the particular business in which they are engaged. So held in *Fort Worth & Denver City Ry. Co. v. Peters*, 87 Tex., 222, 27 S. W. 257.

Car Repairer Injured in Obeying Direct Order of Foreman.—In *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835, it appeared that a car repairer, while under the immediate control of his foreman, and in obeying his direct order, was injured; and that the foreman had authority to employ and discharge the men under him. It was held that the foreman was the representative of the company, and not the fellow servant of the injured employee.

Section Boss—Power to Hire and Discharge Conferred through Road Master.—It is immaterial through what agency the power of hiring and discharging hands may be given to a section boss. That such authority was given through the road master does not affect his status as a representative of the company with respect to the hands

Note

subject to his control. So held in *Fort Worth & Denver City Ry. Co. v. Peters*, 87 Tex. 222, 27 S. W. 257.

Character of Negligent Act Immaterial.—In *Sweeney v. Gulf, C. & S. F. Ry. Co.*, 84 Tex. 433, 19 S. W. 555, it is held that where a foreman employed by a railroad company has authority to control the hands under him and to employ and discharge them, he occupies with respect to them the position of a vice principal; and this character attaches to all his acts affecting those under him; and there is no distinction in this respect between his acts done in the performance of his higher duties and those of an ordinary character which both he and the subordinate employees may be in the habit of performing together.

Injury to Section Hand—Negligence of Foreman in Throwing Back Switch.—In *Sweeney v. Gulf, C. & S. F. Ry. Co.*, 84 Tex. 433, 19 S. W. 555, it is held that where a section foreman has authority to hire and discharge the members of his gang, and to control their work, the common master is liable for injury to a member of the gang who was injured by the negligence of the foreman in throwing back a switch which he had opened.

Death of Engineer—Collision—Failure of Conductor to Send Out Flagman.—In *Culpepper v. International & G. N. Ry. Co.*, 90 Tex. 627, 40 S. W. 386, it appeared that an engineer, while his train was stopped on the track, was killed by a collision with a following train, through the negligence of his conductor in failing to send out brakemen to flag it; that the rules of the company provided that, "all trains will be run under the direction of conductors, except when their directions conflict with rules or involve risks, in which case the engineer will be held equally responsible. It was held that the conductor and engineer were not fellow servants under Tex. Act of March 10, 1891.

Injury to Section Hand—Negligence of Foreman in Causing Sudden Stoppage of Hand Car.—In *Fort Worth & Denver City Ry. Co. v. Peters*, 87 Tex. 222, 27 S. W. 257, plaintiff alleged that B. was foreman of a section gang to which plaintiff belonged, having power to employ and discharge the hands subject to his control, that he directed plaintiff to take a standing position upon a hand car upon which they were riding; and that while plaintiff was in that position, B. who was directing the movements of the car, permitted it to run at a dangerous speed; and that while it was so running, without warning to plaintiff, B. caused the car to be suddenly stopped, whereby plaintiff was thrown off and injured without fault on his part. It was held this alleged a cause of action against the common master.

Injury to Hand Ordered to Hold Car to Be Backed against by Another Car—Failure of Superior to Place Stick in Pockets.—In *Missouri, K. & T. Ry. Co. v. Hamilton* (Tex. Civ. App.), 30 S. W. 679, it appeared that a superior servant, having power to hire and discharge the hands under him, for the purpose of pushing a derailed car upon the track, placed a stick against the car, but not in the pockets provided for the purpose, and ordered one of his hands to hold it so that another car could be backed against it, assuring him there was no danger; and that, while he was obeying the order, a car, backed violently, displaced the stick, causing injury to such hand. It was held that the common master was responsible for the negligence of the foreman in failing to place the stick properly.

Superintendent with Knowledge Essential to Safety of Employees.—Where a superintendent, having authority to employ and control workmen, has knowledge essential to the safety of such servants, the common master is responsible for his failure to impart it to them. So held in *Connor v. Saunders*, 9 Tex. Civ. App. 56, 29 S. W. 1140.

Injury to Section Hand—Collision—Negligence of Road Master.—But in *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. 562, it appeared that a road master of a working train and a working party moved the train so negli-

Note

gently that he brought it into collision with a special train, and a section hand riding upon the work train, but not employed immediately under the eye of the road master, was injured. It was held that although the road master had the power to employ and discharge the men on his train, yet in bringing about the collision he acted as the fellow servant of the section hand, and his negligence was not the negligence of the company.

Mere Grade Immaterial.—The negligence of a servant of a railroad company of one grade is as much one of the risks of the business assumed by an employee of the common master as that of another grade. So held in *Robinson v. Houston, etc., Ry. Co.*, 46 Tex. 540.

In *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473, 18 S. W. 571, it is held that while mere grades of rank of employees of a railroad company engaged in a common employment will not destroy the relation of fellow servant, yet, where one is authorized to employ and discharge servants working under him and to control them in their work, his negligence would be that of the master.

UTAH.

In this jurisdiction the Illinois rule is the law. That is, the master is liable for injury to a subordinate servant which was caused by the negligence of a fellow servant having authority over him when the negligence was committed in exercising the authority conferred upon the superior servant by the master. *Anderson v. Daly Mining Co.*, 16 Utah 28, 50 Pac. 815.

In *Anderson v. Ogden Ry. & Depot Co.*, 8 Utah 128, 30 Pac. 305, it is said in the opinion: "But he (a servant) does not assume risks and dangers caused by the negligent act of another servant under whose orders he works, and who, in a legal sense, stands as the master's representative, in rendering unsafe and dangerous work which the superior servant orders the employee to perform. *East Tennessee, etc., Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600; *Railroad Co. v. Brooks*, 83 Ky. 129; *Railroad Co. v. Keary*, 3 O. St. 201. In the case last cited above the supreme court of Ohio says: 'No service is common which does not admit a common participation, and no servants are fellow servants when one is placed in control over the other.' In the present case the plaintiff was working under the supervision and control of Shea, who had authority to direct when and where he should work, and to discharge him whenever he chose; and we think they were not fellow servants, and that the court committed no error in so instructing the jury. *Reddon v. Railway Co.*, 5 Utah 344, 15 Pac. 262; *Daniels v. Railway Co.*, 6 Utah 357, 23 Pac. 762; *Ryan v. Bagaley*, 50 Mich. 179, 15 N. W. 72; *Railroad Co. v. Stevens*, 20 O. 415; *Railroad Co. v. Keary*, 3 O. St. 201; *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Hough v. Railroad Co.*, 100 U. S. 213; *Railroad Co. v. Fort*, 17 Wall. 553."

Rationale of Doctrine.—In *Armstrong v. Oregon Short Line, etc., Ry. Co.*, 8 Utah 420, 32 Pac. 693, it is said in the opinion: "While it may be reasonable to infer that men laboring together with equal authority will, by their watchfulness, prudence, and their example, influence each other, it would be unreasonable to presume that they will so influence the men in authority over them, and to whose orders they are subject. They (employees), should not be held responsible for those outside the range of their influence. We are disposed to hold that the term 'fellow servants' should not include the man in authority with those subject to his orders, the one that orders with those required to obey him."

Injury to Member of Switch Crew—Negligence of His Foreman in Sending Cars against Those He Was Uncoupling.—The foreman of a switch crew is not the fellow servant of a member of his crew, so as to prevent recovery against the common master for injury to the latter through the negligence of such foreman. So held in *Arm-*

Note

strong *v.* Oregon Short Line & Utah, etc., Ry. Co., 8 Utah 420, 32 Pac. 693. In this case it appeared that the foreman sent cars down against those plaintiff was uncoupling at a rapid speed without signal or warning, although he was chargeable with notice that plaintiff was between the cars.

Foreman of Gang Taking Gravel from Pit.—A foreman in full charge of a gang of laborers engaged in taking gravel from a pit, and using cars and moving trucks for that purpose, is not a fellow servant with such laborers. So held in *Anderson v. Ogden Ry. & Depot Co.*, 8 Utah 128, 30 Pac. 305.

Conductor Not Fellow Servant of Member of His Train Crew.—In *Openshaw v. Utah & Nevada Ry. Co.*, 6 Utah 132, the trial court charged "that the conductor of a railway, who commands its movements, directs when it shall start, at what stations it shall stop, and has the general management of it and control over the persons employed upon it, represents the company, and for injuries to, or the death of one of these employes, from the negligent acts of such conductor, the company is responsible." The opinion of the supreme court, according to the statement of the state reporter, could not be found, but it appears from the partial report of the case that this view was sustained upon appeal.

Superintendent of Mine Not Fellow Servant of Laborer under His Orders.—In *Reddon v. Union Pac. Ry. Co.*, 5 Utah 344, 15 Pac. 262, it is held that the superintendent of a mine who has general and entire charge of the work, employs and discharges workmen, and directs their duties and employments, is not a fellow servant of a common laborer in the mine, whose duty it is to obey the orders of the superintendent. See also, *Trihay v. Brooklyn Lead Mining Co.*, 4 Utah 468, 11 Pac. 612.

Injury to Miner—Failure of Foreman to Warn Him of Dangers of Place.—A foreman, who has entire charge of a mine underground, is not the fellow servant of a miner working in the mine under his directions. So held in *Cunningham v. Union Pac. Ry. Co.*, 4 Utah 206, 7 Pac. 795. In this case the negligence of the foreman was his failure to inform plaintiff that the place where the accident happened was dangerous, and it was held that the foreman's knowledge of the danger was notice to the common master.

Injury to Mine Shift Pusher—Preceding Shift Ordered Off by Foreman of Mine—Unexploded Blasts.—But in *Anderson v. Daly Mining Co.*, 16 Utah 28, 50 Pac. 815, it appeared that plaintiff worked in defendant's mine which employed three shifts of men, and from each shift a pusher was selected to direct the work, receiving fifty cents per day more than his fellow workman; that blasting was done in the bottom of the shaft, and the reports counted after each blast to see if there were any missed holes; that the pushers reported to their successors the number of missed holes, but, if the outgoing pusher failed to report, the oncoming pusher made inquiry, and this was a rule adopted by the pushers for their security; that the pushers had charge of the men in the shifts, and instructed them, but had no authority to hire or discharge a man on the shift; that over the shifts was a foreman of the mine, who was never notified about missed holes; that the shift preceding plaintiff's went off work leaving some of the holes unexploded, in which there was a small amount of powder, and the explosion of which caused the injury to plaintiff; that the shift preceding plaintiff's was ordered off by the foreman. It was held that the shift bosses and the men under them were all fellow servants.

VERMONT.

The superior-servant rule has never been adopted in this jurisdiction. See *Davis v. Cent. Vt. R. Co.*, 55 Vt. 84.

In *Hard v. Vermont & Canada R. Co.*, 32 Vt. 473, it is held that after a railroad company has furnished proper machinery and com-

Note

petent employees, it is not liable to a servant for injuries resulting from the neglect of any of his coservants, employed in the general business of operating the road, even though the negligent servant is superior in grade to the one injured.

VIRGINIA.

Although the limitation seems to be favored in *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, the later decisions of the court of last resort of this state reject the superior-servant limitation, and adhere to the doctrine that the master is responsible for the negligence of a superior servant which results in injury to an employee under his control only when such negligence occurs in the discharge of one of the master's nonassignable duties. See *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Norfolk & W. R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342.

Character of Negligent Act the Test.—In *Norfolk & Western R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692, it is said in the opinion: "That the true rule for determining who are fellow servants is to be determined not from the grade or rank of the offending or injured servant but is determined by the character of the act of the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employee is not a servant but an agent; but as to all other acts they are fellow servants."

Negligence of Boss or Foreman an Assumed Risk.—In *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509, it is said in the opinion: "Where the execution of work directed to be done by the master or his representative is entrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss, or foreman, to see to the execution of such work. 'This sort of superiority of service,' as has been said, 'is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made in a proper case. He, therefore, makes his contract of service in contemplation of the risk from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior stands to him in that respect in the precise position of his other fellow servants.'"

Foreman of Gang Moving Cars on Siding—Mere Authority to Command and Direct.—The fact that the foreman of a gang of hands engaged in moving cars on a siding exercises authority over them and directs them while engaged in their common work, and it is their duty to obey him, does not make him a vice principal. So held in *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

Foreman with Authority to Report Delinquences and to Control and Direct—Absence of Power to Hire and Discharge.—The foreman of a gang of laborers with whom he works, who has no authority to hire or discharge hands, but only to report their delinquences to a superior, is a fellow servant of a member of the gang, although he is in control of the gang and directs them in the performance of the work. So held in *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Foreman of Quarry—Authority to Make and Abrogate Rules and to Appoint Foreman of Squads.—But in *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232, it appeared that the foreman in charge of a stone quarry had general superintendence over the workmen, and made rules for their guidance, and abrogated them at his pleasure; that he divided the hands into squads, and appointed foremen for the squads; and that he was the highest officer in rank of the company, the common master, at the quarry. It was held that

Note

he was not a fellow servant of one of the hands under him, but a vice principal, so that the company was liable for injury to one of such hands from his negligence.

WASHINGTON.

In this jurisdiction the decisions of the court of last resort are somewhat confusing, but from an examination of the more recent cases it appears that the Illinois modification of the superior-servant limitation is now accepted as the correct interpretation of the common-law rule on the question.

Yard Boss of Lumber Yard—Power to Command—Authority to Hire and Discharge Subject to Approval.—In *Zintek v. Stimson Mill Co.*, 9 Wash. 395, 37 Pac. 340, it is held that the yard boss of a lumber yard, charged with the duty of superintending the piling of lumber and directing the workmen engaged in such work, who are subject to his orders and control, is a vice principal with respect to them, and not their fellow servant, although he occasionally acts as tally man in measuring lumber, and although his authority to hire and discharge such hands is subject to the approval of the general superintendent.

Foreman of Logging Crew Vice Principal of Crew of Donkey Engine—Selection of Insufficient Swamp Hook.—A foreman known as a "hook tender" in charge of a logging crew, whose duty it is to give directions both as to the operation and selection of appliances for moving from one location to another a donkey engine and a large water tank containing 600 or 700 gallons of water, by means of a swarp hook attached to a cable pulled by the engine, is a vice principal of the engineer and men of the crew, and his negligence in selecting an insufficient swamp hook is that of the common master. So held in *Bailey v. Cascade Timber Co.*, 32 Wash. 319, 73 Pac. 385.

Master Only Liable for Negligence in Discharging Nonassignable Duties.—But in *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830, it is said in the opinion: "We find in *Crispin v. Babbitt*, 81 N. Y. 516, what seems to us the most correct, brief statement of some of the points to be regarded in cases of this kind, which has come to our notice. The court said, p. 520, 'The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee.'"

Mine "Fire Boss"—Authority to Direct Hands to Work in Another and Safe Place—Absence of Control.—And in *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577, 34 Pac. 152, it is held that a "fire boss" in a coal mine, charged with the duty of directing the men to leave the place where they are working and go to another place, if he thinks continuance at work in the former place is dangerous, but who is invested with no control over the miners in the prosecution of their work, is their fellow servant, and not a vice principal.

ROSS CASE FOLLOWED.

Foreman of Construction Work as Head of Separate Department.—In *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 46 Pac. 334, it is held that a foreman in charge of construction work, with authority to employ and discharge workmen and direct them in the performance of their work, and who is the sole representative of the company at the place or within miles thereof, stands in the position of a vice principal although it may be his duty to receive orders from, and to report to, the roadmaster, whose headquarters were at a con-

Note

siderable distance from place of work. But here the Ross Case was followed, the court holding that such foreman was in fact in charge of a separate department of the master's business.

Conductor of Construction Train Vice Principal of Brakeman.—The conductor of a construction train is a vice principal with respect to his brakeman, and not the latter's fellow servant. So held in *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665. But here, also, the decision on this point only shows the far reaching influence of the Ross Case.

Conductor Not Fellow Servant of Fireman.—The conductor of a train is not the fellow servant of its fireman, but a vice principal. So held in *Howe v. Northern Pac. Ry. Co.*, 30 Wash. 569, 70 Pac. 1100. But in this case the court merely adopted the doctrine of the Ross Case.

WEST VIRGINIA.

In this state the superior-servant limitation has been expressly rejected, and the Ross Case criticised, by the later decisions. See *Jackson v. Norfolk & W. R. Co.*, 43 W. Va. 380, 27 S. E. 278; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140. But the rule prevailing in this jurisdiction has been frequently misapplied by the supreme court of the state.

The master's responsibility to one servant for the negligence of another is not dependent on the grade or rank of such employees, nor on the fact that one has authority over the other, but on the character of the negligent act. So held in *Jackson v. Norfolk & W. R. Co.*, 43 W. Va. 380, 27 S. E. 278. This decision is approved and followed in *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140.

Superior Servant Represents Master Only in Performing Nonassignable Duties.—Whenever a railroad company delegates to another the performance of a duty it owes to one of its employees, it is responsible for the manner in which such duty is performed by the person selected as its agent, and to the extent of the discharge of such duty the agent stands in the place of the company but as to all other matter he is a mere coservant of the other employees of the common master. So held in *Riley v. West Va., etc., Ry. Co.*, 27 W. Va. 145.

Ross Case Criticised.—In *Jackson v. Norfolk & W. R. Co.*, 43 W. Va. 380, 27 S. E. 278, it is said in the opinion: "But another rule has been followed to a very considerable extent, known as the rule of superior servants; that is where the negligent servant in grade of employment is superior to the injured one, or where one servant is placed by the master in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master as his alter ego or vice principal, and the inferior servant is injured by the negligence of the superior servant, the master is liable. This rule, as McKinney, Fed. Ser., § 43, says, has produced endless confusion, and is favored by many text writers, and adopted by the Southern and Western courts, and by the United States Supreme Court, but, on the other hand, the entire doctrine of the liability of the master for a superior servant's tort to an inferior is repudiated by courts whose number and authority outweigh those favoring the doctrine. But, since Mr. McKinney wrote, that rule has been overthrown by a change in the supreme court of the United States, whose decision in the case of *Railway Co. v. Ross*, 112 U. S. 377 (5 Sup. Ct. 184), has been the parent of much erroneous decision upon this subject."

Foreman—Power to Command—Authority to Discharge Subject to Approval.—Where a foreman is put in charge of a gang of laborers by a railroad company and invested with authority to discharge them subject to the approval of the supervisor, and charged with the duty to see that they perform their duties, such foreman, with respect to the discharge of all his duties to such hands, is the representative of

Note

the railroad company, and not their fellow servant; and if one of the rules of the company, provides that "extra trains may pass over the road at any time without previous notice, and the foreman must always be prepared for them;" and another rule provides "he must run the hand cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule requires him "to compare his time each day with the clock at the nearest telegraph office, or with the conductor on the train," these rules as well as the law, require him to use the opportunities thus daily afforded, or any other opportunities to ascertain what trains are expected to run over his section of the track by previous arrangements and when; and if he neglects this duty, and without any fault of one of the laborers under him, his hand car comes in collision with an extra train, which, had he performed this duty, would not have occurred, and the laborer is injured, the company is liable. So held in *Criswell v. Pittsburg, etc., Ry. Co.*, 30 W. Va. 798, 6 S. E. 31. But this seems a misapplication of the rule laid down in this case.

Conductor Vice Principal of Other Members of Train Crew.—In *Haney v. Pittsburgh, etc., Ry. Co.*, 38 W. Va. 570, 18 S. E. 748, it is held a conductor invested with the entire control and management of a train is a vice principal with respect to the brakeman, porters and other subordinate employees.

In this case it is said in the opinion: "One of the duties which a railroad company owes to its employees is to place careful and competent men in charge of its trains, who will conduct the same in such a manner as not to inflict injury and damage to those employed as laborers along its lines." But this case, among others, was overruled in *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

WISCONSIN.

Here the limitation is expressly rejected by some of the decisions of the supreme court of the state, and is favored by none. See *Dwyer v. American Express Co.*, 82 Wis. 307, 52 N. W. 304; *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374, 64 N. W. 1033; *Heine v. Chicago & N. W. Ry. Co.*, 58 Wis. 525, 17 N. W. 420; *Hoth v. Peters*, 55 Wis. 406, 13 N. W. 219; *Howland v. Milwaukee Lake Shore, etc., Ry. Co.*, 54 Wis. 226, 11 N. W. 529; *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. 807; *Klochinski v. Shores Lumber Co.*, 93 Wis. 417, 67 N. W. 934; *Pease v. Chicago & N. W. Ry. Co.*, 61 Wis. 163, 20 N. W. 908; *Stutz v. Armour*, 84 Wis. 623, 54 N. W. 1000; *Peschel v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338, 21 N. W. 269.

In *Dwyer v. American Express Co.*, 82 Wis. 307, 52 N. W. 304, it is said in the opinion: "The courts of some states hold that, if an employer put one servant under the control of another, such servants are not fellow servants and the master is liable if the subordinate servant, is injured by the negligence of the other, without regard to the nature of the work or business in which they were engaged at the time. * * *

Other courts adhere to the doctrine that whether the relation of coemployee or fellow servant exists between different employees engaged in the same business for the same employer, is not to be determined by the rank or grade of either servant, but by the character of the act being performed by them. 'If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employee is not a servant, but an agent, but as to all other acts they are fellow servants.' 7 Am. & Eng. Ency. of Law, 834, and cases cited. This court is unmistakably committed to the latter rule."

In *Heine v. Chicago & N. W. Ry. Co.*, 58 Wis. 525, 17 N. W. 420, it is said in the opinion: "The distinction which some of the courts have made in favor of the employee, who by the nature of his employment is under orders or directions of some other employee as to the way or manner in which he performs his part of the common

Note

work in hand, and holding that employees having such relations to each other are not coemployees within the meaning of the law above stated, and that the principal is liable for an injury resulting to the subject employee through the negligence of the employee having the power to direct his movements and acts, is not sustained by the weight of authority outside of this state, and has not been adopted by this court."

Foreman Subordinate to Another Having Power to Hire and Discharge and to Give Working Directions.—A foreman without general authority to employ or discharge the men under him, and subordinate to another who had that authority and who had charge and control of the different gangs of men working for the railroad company, and gave directions to the foreman as to what they were to do, is the fellow servant of a hand working under him, so that the common master is not liable for an injury to the latter caused by the negligence of the foreman. So held in *Peschel v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338, 21 N. W. 269.

Injury to Hand Ordered to Count Slippery Lumber in Car—Negligence of Foreman in Causing Car to Be Moved—Fall of Lumber.—In *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219, the complaint alleged that plaintiff, while employed in defendants' lumber yards, having assisted in loading a car with lumber partly covered with snow, and therefore extremely slippery and difficult to pile so as not to fall down, was ordered by his foreman, who had authority over plaintiff, to count the number of pieces of a certain length piled on the car; that by reason of the slippery condition of the lumber a slight jar would cause the piles to fall down unless properly showed up, which was not done; that plaintiff got into the car and while stooping down between the piles and in the act of counting the lower tiers, such foreman, knowing the dangerous position of plaintiff, without warning him, negligently caused the car to be moved, thereby causing one of the piles of lumber to fall upon plaintiff. It was held that such foreman was plaintiff's fellow servant, for whose negligence defendants were not liable.

"Shift Boss" in Mine—Miner Ordered to Work Where Unexploded Blast.—A "shift boss" in a mine, charged with the duty of directing miners where to work, in performing such duty, acts as a vice principal, and if he knows of an unexploded blast, at the place where he sets a miner to work, of the existence of which the latter is not chargeable with notice, and does not inform him of the danger, the master is responsible for an injury to the miner caused by the explosion of such blast. So held in *McMahon v. Ida Mining Co.*, 95 Wis. 308, 70 N. W. 478.

WYOMING.

Here there are few decisions throwing light on this question, but in *McBride v. Union Pac. Ry. Co.*, 3 Wyo. 248, 21 Pac. 687, it appeared that plaintiff had been ordered by the "gang boss" to assist in lowering an engine in defendant's shops. The engine was hoisted above the track, and was resting on timbers, which were resting on the rails and above a pit two or three feet deep. In removing the last timber but three men were employed, plaintiff being on the right-hand side and J. and E. on the left. By order of the "boss," J. left the work, and the end of the timber held by E. dropped into the pit, causing the other end to fly up and hit plaintiff, inflicting the injuries complained of. The jury found that the "gang boss" had immediate control of the work, but that he was under the general control of the master mechanic; that the latter was not in the shops at the time, but that the foreman, who superintended the works in the shops under the general directions of the master mechanic, was present. It was held that the defendant could not be held liable

Orient Ins. Co. v. Northern Pac. Ry. Co

for the negligence of the "gang boss" as a vice principal in exclusive control of a department.

ENGLAND.

Here the superior-servant doctrine has never been recognized as a common-law rule.

In *Wilson v. Merry* (Eng.), L. R. 1 H. L. Sc. App. Cas. 332, Lord Chancellor Cairns said: "The master has not contracted or undertaken to execute in person the work connected with his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select competent and proper persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master." See also, *Priestley v. Fowler*, 3 Mees. & W. (Eng.), 1 (handed down in 1837).

A. R. Y.

ORIENT INS. CO. OF HARTFORD, CONN., v. NORTHERN PAC. Ry. Co.

(Supreme Court of Montana, Jan. 6, 1905.)

[78 Pac. Rep. 1036.]

Act of God.—The act of God is a defense which must be pleaded, to be available.

Contributory Negligence—Pleading.*—Contributory negligence is a defense which must be pleaded, to be available; and, there being nothing in any allegation of the complaint to indicate contributory negligence, the complaint need not negative it, in which case its allegation that the destruction of the property was without fault of the owners is surplusage, so that neither does it excuse defendant from pleading contributory negligence, nor does the general denial thereof by the answer raise such issue.

Fire Set by Locomotive—Evidence—Emission of Sparks.†—In an action for the burning of property by sparks from a locomotive, a witness may testify how the quantity of sparks thrown by the engine at the time compared with that thrown by other engines along the road.

Warehouse Company.—Civ. Code, § 393 (25), providing that a corporation may be formed for the transaction of any commercial business, authorizes a corporation for warehousing goods for shipment.

Same—Fire Set by Locomotive—Stockholders' Property—Liability of Railroad—Lease—Exemption from Liability.—A railroad company is not relieved of liability for the burning of goods in a warehouse because the owners of the goods are stockholders in the warehouse company—it being a corporation—though by its lease from the railroad company it waived all claim for damages from destruction of the warehouse by acts of the railroad company.

Commissioners' opinion. Appeal from District Court, Custer County; C. H. Loud, Judge.

*See foot-note appended to *Louisville & N. R. Co. v. Paynter's Adm'x* (Ky.), 14 Am. & Eng. R. Cas., N. S., 140, 37 Am. & Eng. R. Cas., N. S., 140.

†See foot-notes appended to *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

Orient Ins. Co. v. Northern Pac. Ry. Co

Action by the Orient Insurance Company of Hartford, Conn., against the Northern Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. Wallace, Jr., and Chas. Donnelly, for appellant.

Van Ness & Redman and Sydney Sanner, for respondent.

CLAYBERG, C. C. Appeal by the Northern Pacific Railway Company from a judgment and order overruling its motion for a new trial.

It appears from the complaint that on June 30, 1900, the warehouse owned by the Custer County Wool Warehouse Company, and situated upon the right of way of the railway company, was ignited by sparks from one of defendant's engines and burned; that there was stored therein certain wool belonging to the firm of Hunter & Anderson, which was consumed with the building; and that this firm had their wool insured by the plaintiff company, which paid them the sum of \$3,355.57, the value thereof. The complaint further alleges "that the fire by which said above referred to wool was destroyed as aforesaid was caused by sparks thrown out by a locomotive at said time and place owned, used, and operated by the defendant herein, which said sparks escaped from said locomotive, and fell in and upon said warehouse and its contents, and ignited the same, by reason of the defective construction and impaired condition of said locomotive, and the careless and negligent manner in which the same was then and there used and operated by defendant, and wholly by reason thereof, and without any fault on the part of said firm of Hunter & Anderson, or any member thereof, or plaintiff." Hunter & Anderson prior to the commencement of the suit assigned, transferred, and set over to plaintiff all claim, demand, and right of action growing out of the destruction of the wool, due to the alleged negligence of defendant. The railway company, after certain admissions and denials of the complaint, alleged as a separate and affirmative defense that the wool warehouse company was a joint-stock association and a joint partnership, and that Hunter & Anderson were joint owners and partners therein; that said "joint-stock association" leased the ground upon which the warehouse was built from the railway company, and, by the terms of such lease, assumed all risk of loss to the building and contents occasioned by fire and sparks from locomotives, engines, etc. For a second separate and affirmative defense, defendant alleges that the warehouse was carelessly and improperly built of highly inflammable material, which was well known to Hunter & Anderson when they placed their wool therein; that the plaintiff also well knew these facts when it insured said wool, and, in consideration of a higher premium, insured against this additional risk. Plaintiff denied all the allegations of new matter by replication. The case was tried before a jury, and resulted in a verdict for plaintiff in the sum of \$3,355.57, and judgment was entered thereon. Defendant made a motion for a new trial, which was overruled.

Orient Ins. Co. v. Northern Pac. Ry. Co

The only errors assigned in the brief of appellant are as follows: (1) The denial of defendant's motion for a new trial. (2) The overruling of defendant's objections to a certain question asked by plaintiff's counsel of witness Buckner. (3) Giving of instruction No. 26. (4 and 5) The refusal of defendant's offered instructions 35 and 36. (6) The refusal to allow defendant to show that Hunter & Anderson owned 10 shares of stock in the warehouse company.

1. It is first urged by appellant in the argument that the destruction of the wool was proximately caused by an unprecedented wind blowing on the day of the fire, and would not have occurred, had there not been such wind. Appellant therefore claims that the injury was caused by the act of God, and not by its alleged negligence. We cannot consider this proposition, because the act of God is a defense to the action, and must be pleaded as such. We look in vain to appellant's answer for any allegations on which this defense may be based.

2. The next proposition argued is that of imputed contributory negligence on the part of Hunter & Anderson, plaintiff's assignees. It is claimed that the warehouse company was bailee of Hunter & Anderson, and was guilty of contributory negligence, and that such contributory negligence is imputable to Hunter & Anderson, which would prevent a recovery by them, and therefore by plaintiff. This point is based upon the giving by the court of paragraph 26 of the charge, and the refusal of the court to give charges 35 and 36 requested by defendant. By refusing to give the charges requested, and by giving paragraph 26, it is claimed that the court practically withdrew from the jury the consideration of contributory negligence. This was right, on the ground that contributory negligence was not put in issue by the pleadings; and it may have been equally right on other grounds, appearing to the satisfaction of the court. Although the court below may not have based its action on the ground of want of an issue raised by the pleadings, yet, if its action was correct, even though based upon other grounds, it must be affirmed. Under the decisions of this court, contributory negligence on the part of plaintiff is a defense which, in order to be relied on, must be pleaded by defendant, in cases of this character. *Ball v. Gussenhoven*, 74 Pac. 871, 29 Mont. 321; *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, and cases cited. The existence of contributory negligence need not be negatived in the complaint unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff. Upon the other allegations of this complaint, it is very apparent that the proximate cause of the injury in this case, for which suit was brought, was not the act of plaintiff, or of any of its predecessors or its assignees, but that of defendant. We find no allegations of such defense in the answer. True, the allegation is found in the complaint that the wool was destroyed by negligence of defendant,

Orient Ins. Co. v. Northern Pac. Ry. Co

“and wholly by reason thereof, and without any fault on the part of said firm of Hunter & Anderson, or of any member thereof, or plaintiff.” This allegation was denied generally in the answer. This is not sufficient to raise the issue of the contributory negligence of the plaintiff or its assignors. Plaintiff was not required, as above stated, to allege want of contributory negligence, and therefore its allegations above quoted are mere surplusage, and need not be proved. Defendant cannot be heard to assert that it is excused from pleading the defense of contributory negligence because of this allegation in the complaint.

3. The next alleged error argued was the overruling of defendant's objection to the following question asked of witness Buckner: “Q. With regard to the throwing of sparks by engines of the Northern Pacific Railway when pulling trains of that company over this road, how did the quantity and size of sparks thrown out of the engine on the night of the fire, and as to which you have testified with regard to quantity and size— How did that throwing of sparks compare with other engines throwing sparks along the line of this road?” Counsel for defendant interposed the following objection: “Objected to on the ground that the witness was not entitled to give an opinion by way of comparison between different engines; and, second, because inadmissible without a showing that the conditions as to the engines compared were practically the same.” To this question the witness answered: “As far as the size of them was concerned, I never noticed any particular size of them; but, in quantity, this engine threw more than I ever saw along at that time, or had seen.” The evident purpose of this testimony was to show negligence on the part of defendant, either in the equipment of the locomotive, or in its careless handling. The question did not call for expert testimony, and we think the evidence was properly received. As is well said by the Supreme Court of Wisconsin in the case of *Brusberg v. Milwaukee, etc., Railway Co.*, 55 Wis. 106, 12 N. W. 416: “The witness for plaintiff was allowed, against defendant's objection, to testify how the fire thrown from the locomotive that morning at the time it passed by his barn compared with fire coming from the engines on that road before that time. We think this evidence was competent, to show that it was at that time emitting an unusual quantity of fire. The same objection was made to the same kind of testimony given by other witnesses of plaintiff. We see no reason for excluding this kind of evidence, and think the objections were properly overruled.” As further sustaining this proposition, the following cases might be consulted: *Johnson v. Chicago, etc., R. Co.*, 31 Minn. 57, 16 N. W. 488; *Chicago, etc., R. Co. v. McCahill*, 56 Ill. 28; *Wabash R. Co. v. Smith*, 42 Ill. App. 527; *Ruppel v. Manhattan R. Co.*, 13 Daly, 11; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

4. The next question presented for consideration is that the Custer County Wool Warehouse Company is not a corporation,

Orient Ins. Co. v. Northern Pac. Ry. Co.

but an association of individuals or a partnership. Appellants claim that, this being true, each stockholder or partner was bound by the provisions of the lease from the Northern Pacific Railway Company to the association or partnership, by which they waived all damages which might arise from a destruction of the warehouse by any acts of the railway company. The ground upon which the contention that the warehouse company was not a corporation is based is that there is no statute in Montana providing for the formation of corporations for the purpose of doing the business in which the wool warehouse company was engaged, and that the purposes mentioned in the statute for which corporations may be formed are exclusive. We find that subdivision 25 of section 393 of the Civil Code provides that a corporation may be formed for "the transaction of any mercantile, commercial, industrial, manufacturing, mining, mechanical or chemical business." We think it is clear from the certificate of incorporation of the Custer County Wool Warehouse Company that its organization may be maintained under the purposes mentioned in the above-quoted subdivision. The business of carrying on a warehouse is closely connected with, and is a part of, the general commercial business of the country. The act of a warehouse company in storing goods for shipment is a necessary part of the transportation of the wool from the place of its production to the markets. Warehouses are therefore provided for this purpose, and the business of a warehouseman is just as much a link in wool commerce as its transportation to market by the railroad company. The business of warehousing grain has been recognized by the Supreme Court of the United States to be a part of the commerce of the country. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

5. Further error is alleged upon the refusal of the court to allow defendant to show that Hunter & Anderson were the owners of 10 shares of stock in the Custer County Wool Warehouse Company. We are of the opinion that the court did not err in excluding this evidence. If the Custer County Wool Warehouse Company was a corporation, it made no difference whether Hunter & Anderson were stockholders in it or not.

We are therefore of the opinion that there is no error disclosed by the record, and the case should be affirmed.

POORMAN, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

STEWART v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina, Nov. 15, 1904.)

[48 S. E. Rep. 793.]

Wrongful Death—Evidence—Admissions.—In an action against a railroad company for the wrongful death of plaintiff's decedent on its track, for the purpose of showing an admission of the killing by defendant, a portion of a paragraph of defendant's answer containing such admission is admissible without the remaining portion.

Same—Same—Harmless Error.—In a trial of an action against a railroad company for negligently killing a person on its track, the error of excluding evidence as to the killing was harmless, where the issue, "Did defendant negligently kill plaintiff's decedent?" was answered in the affirmative.

Same—Same—Number of Crossings in Vicinity—Signals.—In an action against a railroad company for the wrongful death of a person at a crossing, evidence as to the number of crossings within one-half mile of the place of the accident was properly excluded as immaterial; the duty of the engineer to sound the whistle, so far as decedent was concerned, only extending to the crossing at which he was killed.

Same—Contributory Negligence—Intoxication.—In an action for the wrongful death of a person at a railroad crossing, the evidence showed that decedent had been drinking, was seen going toward the crossing in an intoxicated condition, and was seen sitting or lying on or near the track. Held, that decedent was guilty of contributory negligence if he was killed by defendant's train.

Same—Same—Special Instructions.—The refusal to give special instructions on the question of contributory negligence will not be reviewed where, on plaintiff's own evidence, the court properly held, as a matter of law, that decedent was guilty of such negligence.

Instructions.—It is not error to refuse an instruction, the substance of which has been given.

Same.—The refusal of instructions relating to an issue found in appellant's favor will not be reviewed.

Same.—It is proper to refuse an instruction where there is no evidence on which to base it.

Contributory Negligence—Intoxication.*—In an action against a railroad company for the death of a person on its track, it was proper to refuse an instruction that "if decedent was drunk and in a helpless condition on or near the track, and was unable to realize the dangerous position he was in, then decedent would not be guilty of contributory negligence."

Presumption of Due Care on Part of Deceased.—Instructions.†—In an action against a railroad company for the death of a person on its track, plaintiff asked the court to instruct that "the law presumes that the person found killed by the negligence of another exercised due care himself." This the court gave, and added: "Likewise the law presumes that a person such as an engineer does his duty. In fact, as a rule, the law does not presume negligence, and it requires a person who charges a breach of duty or negligence to prove it." Held, that the modification or addition was proper.

Appeal from Superior Court, Rowan County; O. H. Allen, Judge.

Action by J. J. Stewart, administrator, against the North Caro-

*See foot-notes appended to *Vizacchero v. Rhode Island Co.* (R. I.), 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172.

†See foot-note appended to *Reed v. Queen Anne's R. Co.* (Del.), 11 R. R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332.

Stewart v. North Carolina R. Co

lina Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. Lee Wright and *P. S. Carlton*, for appellant.

T. C. Linn, *F. H. Busbee*, and *Chas. Price*, for appellee.

MONTGOMERY, J. This action was brought to recover damages from the defendant on account of the killing of the plaintiff's intestate through the alleged negligence of the defendant. On the trial the plaintiff first introduced as a witness the widow of the deceased, who proved the age of the intestate; that he worked in a cotton mill at \$1 per day; that his health was good, also his habits; and that he left one child. The mortuary tables showing the intestate's expectancy were next introduced. Then the plaintiff offered in evidence a part of the first paragraph of the defendant's answer, to wit, "that the plaintiff's intestate was struck by the engine pulling train 34 at the time alleged; that no one saw him struck or ever heard him say anything about how he was struck, but the defendant alleges that the said deceased, J. R. Reeves, was upon the track, and that the engineer of train 34 did not see him until he saw him fall." That evidence was objected to by the defendant unless the whole paragraph should be admitted. The omitted part of the paragraph, separated from the other by a colon, was in these words: "That the engineer and fireman were keeping a lookout, and in no way upon said occasion was the defendant negligent in its conduct against the said deceased. * * *" The objection was sustained, and the evidence offered excluded. It was competent to show the killing of the intestate by the defendant, and also to show its negligence. It was an admission, complete in itself, and the plaintiff was not compelled to put in matter of explanation or exculpation on the part of the defendant. The defendant would have that privilege itself. 1 Greenleaf, Ev. (16th Ed.) § 201. But the error was harmless, for the first issue, "Did the defendant negligently kill the plaintiff's intestate?" was answered in the affirmative. The broken paragraph was not evidence tending to show that the defendant could have avoided killing the intestate, on the supposition that the plaintiff was guilty of contributory negligence. There had been, up to the time the evidence was refused, no testimony offered on the part of the plaintiff going to show any opportunity the defendant might have had of avoiding the killing.

In the case on appeal it is stated that the defendant asked the witness Carter how many crossings there were between this crossing and Charlotte, and that the plaintiff objected, and the objection was sustained. In the plaintiff's brief, however, his counsel state that the plaintiff asked the question, and excepted to its exclusion. His contention was that, within half a mile before reaching the crossing where the intestate was killed, there were within one-half a mile from that spot at least five public crossings, and that, if the engineer had given his signals at each of

Stewart v. North Carolina R. Co

those crossings, the intestate or some other person would have heard them, and also that the failure to blow at each of those crossings was some evidence that proper signals were not given for the crossing where the intestate was killed, and that therefore the engineer was not exercising a proper lookout. That view of the law, no doubt, was derived from the decision in *Fulp v. Railroad*, 120 N. C. 525, 27 S. E. 74. There is not raised in this case the question whether or not an engineer in charge of a moving locomotive is required to sound the whistle for a crossing, in order to give notice to a pedestrian who is on the track beyond the crossing. We are clear, however, that, if we should hold that to be the law, we would not extend the requirement to more than one crossing. His honor was right in refusing the evidence.

His honor instructed the jury to answer the second issue—that of contributory negligence on the part of the plaintiff—“Yes,” if the killing of the deceased by the train was proved. There was no disputed fact concerning the intestate’s conduct at the time he was killed. The evidence introduced by the plaintiff tended to show that the intestate was drinking or drunk; that he was sitting or lying upon or very near the defendant’s track; that there was an injury, mortal, on the forehead, and one on the back of his head; that he was seen going toward this crossing in a state of intoxication, and that blood and hair were found on a bar of the cattle guard by the track of the railroad; and that the body was found there. One witness said: “If he had been sitting on the cattle guard, erect, I think he would have been hit about the chest. If he had been sitting there, leaning over, facing the track sidewise, I think the steam pipe to the steam chest would have struck him on the head. The whole in the front part of his head corresponds with the size of this pipe or steam cock in the steam chest. This steam pipe or cock projects out from the steam chest and comes over the cross-beam on the end of the cattle guard. To have hit him over the eye, he would have to be sitting with his head looking up the road. I cannot explain how it made only a little hole over the eye. He would have to be sitting sideways.” As a matter of law, upon that evidence, his honor properly told the jury that the intestate was guilty of negligence, if they found that he was killed by the train. *Neal v. Railroad*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684; *Pharr v. Railroad*, 119 N. C. 757, 26 S. E. 149; *Frazier v. Railroad*, 130 N. C. 357, 41 S. E. 941.

The plaintiff requested his honor to give 24 special instructions to the jury, and in his exceptions he insists that only one—the first—was given, and he excepted to nearly every sentence of the charge in chief. The special instructions asked, numbered 1, 2, 3, 4, and 16, bore upon the question of contributory negligence of the plaintiff, and need not be considered, for we have said that, upon the evidence of the plaintiff, the judge correctly held, as a matter of law, that the intestate was guilty of con-

Stewart v. North Carolina R. Co

tributory negligence, and so instructed the jury. Requests numbered 5, 7, 10, 13, 14, 15, 17, and 18 were given in substance in the main charge. Requests numbered 6, 12, and 19 need not be noticed, for they related to the first issue, and that issue was found against the defendant. The twenty-fourth request was on the question of damages, and that was not pertinent, owing to the disposition that was made of the second issue. Requests numbered 8 and 9 were, in substance, that the law devolved upon the defendant the duty to keep a vigilant lookout in operating its trains when approaching public crossings, and if the defendant failed to keep such lookout, and such failure was the proximate cause of the intestate's injury, the jury should answer the first and third issues "Yes." His honor properly refused to give the instruction, for there was no evidence tending to show that the failure to give signals for the crossing was the proximate cause of the injury. It did not appear from any of the evidence that the intestate could have heard the signals, or could have gotten out of danger if he had heard them. There was no harm in refusing to give prayers numbered 20 and 22, for the reason that the first issue was found against the defendant, and the second was, upon the evidence of the plaintiff, ordered to be found for the defendant and against the plaintiff.

The twenty-first prayer was in these words: "If the jury find from the evidence that the plaintiff's intestate was drunk, and was in a helpless condition upon or near the track, and was unable to realize the dangerous position he was in, then the intestate would not be guilty of contributory negligence, and the jury should answer the second issue 'No.'" His honor properly refused to give that instruction. We cannot understand how it can be contended that a man who would drink spirituous liquor until he should become unconscious, or take anything else until he should become insensible, and then lie down in that state upon a railroad track, is in the exercise of due care for his personal safety. Such a contention seems to us to be trifling with the law. In *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611, where two negro boys laid down on a railroad track and went to sleep, it was held that they were guilty of contributory negligence; and so in *Lloyd v. Railroad*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764, where a man drunk and lying on the track was killed, it was held that he was negligent.

The twenty-third prayer was properly refused, for it is founded on evidence offered, but properly excluded.

The plaintiff, in the first instruction prayed for, asked his honor to tell the jury that "the law presumes that a person found dead and killed by the negligence of another exercised due care himself." The instruction was given as asked, but his honor added "likewise the law presumes that a person such as an engineer does his duty," to which the plaintiff excepted. His honor went on to say further: "In fact, as a rule, the law does not

Gorham Mfg. Co. v. New York, etc., R. Co

presume negligence, and it requires a person who charges a breach of duty or negligence to prove it." The plaintiff excepted to the latter clause of that sentence. The question raised by this last exception has been frequently held by this court against the plaintiff, and we see no error in the instruction of the judge to which the first exception was directed.

On the third issue, the court, in drawing a distinction between injury by trains to animals and human beings, said: "The law is different as to a dumb animal and a human being, because of the intelligence of the human being. If a human being is upon or near a track, and apparently in possession of his senses, the engineer is justified in assuming that such person will use his faculties for his own safety and get out of the way, and he would not be required to stop or slack his speed." The plaintiff excepted to that proposition of law. It was true. And although it was without strict application to the facts of this case, it could have done the plaintiff's cause no harm. The court went on to say: "But if a person on or near enough to the track to be in danger is down, and in such a condition as to indicate that he is helpless, then it becomes the duty of the engineer to take notice of this apparently helpless condition, if he sees him in time, or could have seen him in time in the exercise of due care." The plaintiff excepted to that part of the charge. He contends that the instruction made the liability of the defendant in this case to depend on whether the intestate was actually down, and leaving the jury under the impression that, unless they found the intestate was actually down, they should answer the third issue—the last clear chance, as it is called—"No." The exception was too technical to be sustained. The jury could not have been misled by it.

No error.

GORHAM MFG. CO. v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island, Feb. 27, 1905.)

[60 Atl. Rep. 638.]

Acts of Incorporation—Amendments—Necessity of Pleading.—Under Gen. Laws 1896, c. 26, § 15, providing that every act of incorporation shall be so far a public act that the same may be declared on and given in evidence without specially pleading it, acts amendatory of an act of incorporation may be introduced in evidence, though not pleaded.

Fires Set by Locomotives—Liability—Application of Statute—Railroad Extension.—An act passed at the June session 1836, of the General Assembly, amending an act incorporating the New York, Providence & Boston Railroad Company, provided in section 2 that said corporation should be liable for damages from the burning of property by fire communicated by the engines. An act passed at the October session, 1846, further amending the original act of incorporation, authorized the railroad company to construct an extension of its existing railroad, and provided in section 9 that such railroad,

Gorham Mfg. Co. v. New York, etc., R. Co

when constructed, should be managed, governed, and protected in all respects by the provisions of the charter and amendments thereto granted to the corporation. Held, that section 2 of the act of 1836 applied to the extension authorized by the act of 1846, and made the railroad company liable for a fire caused by an engine operating on the extension.

Same—Evidence—Cinders Emitted on Former Occasion.*—In an action against a railroad company to recover for property destroyed by fire alleged to have been communicated by sparks from an engine, evidence that, the day before the fire, cinders were found on the roof of the burned building, was competent.

Action by the Gorham Manufacturing Company against the New York, New Haven & Hartford Railroad Company. On petition of defendant for new trial. Petition denied.

Argued before Douglas, C. J., and Dubois, J.

Edwards & Angell, for plaintiff.

David S. Baker and *Louis A. Waterman*, for defendant.

DUBOIS, J. This is an action of debt for damage caused by fire communicated from defendant's engine, brought under section 2 of an act passed at the June session, 1836, of the General Assembly, entitled "An act in amendment of an act entitled 'An act to incorporate the New York, Providence and Boston Railroad Company,'" passed at June session, A. D. 1832, which section reads as follows: "Sec. 2. And be it further enacted, that said corporation shall be liable to pay to the owner or owners for all damages which may arise from the burning of houses, wood, hay, or any other substance whatever, by fire communicated from the engines, cars, or other vehicles of said corporation, or by those in their employ, damages equal to the value thereof, with all the lawful costs; to be recovered in an action of debt, in any court competent to try the same."

After a verdict for the plaintiff, the defendant has brought its petition for a new trial, and now claims that four questions are thereby raised for determination, viz., first, is there a variance between the declaration and the evidence? second, is the defendant liable, under said section 2 for the fire which is the subject-matter of this suit? third, is the verdict against the evidence? and, fourth, did the presiding justice err in admitting testimony?

The question of variance arose in manner following: It appears that the New York, Providence & Boston Railroad Com-

*See foot-notes appended to *Black v. Minneapolis & St. L. R. Co.* (Iowa), 9 R. R. R. 211, 32 Am. & Eng. R. Cas., N. S., 211; *Alabama & V. Ry. Co. v. Ætna Ins. Co.* (Miss.), 12 R. R. R. 52, 35 Am. & Eng. R. Cas., N. S., 52.

As to the admissibility of evidence of other fires set by defendant's locomotives, see foot-notes appended to *Norfolk & W. Ry. Co. v. Briggs* (Va.), 13 R. R. R. 201, 36 Am. & Eng. R. Cas., N. S., 201; *Louisville & N. R. Co. v. Fort* (Tenn.), 12 R. R. R. 276, 35 Am. & Eng. R. Cas., N. S., 276; *Olmstead v. Oregon Short Line R. Co.* (Utah), 12 R. R. R. 261, 35 Am. & Eng. R. Cas., N. S., 261; *Louisville & N. R. Co. v. Short* (Tenn.), 12 R. R. R. 57, 35 Am. & Eng. R. Cas., N. S., 57; *Alabama & V. Ry. Co. v. Ætna Ins. Co.* (Miss.), 12 R. R. R. 52, 35 Am. & Eng. R. Cas., N. S., 52.

Gorham Mfg. Co. v. New York, etc., R. Co

pany was created by an act of the General Assembly passed at its June session, 1832; that this act was amended in the June session, 1836, by the act hereinbefore referred to, and that said acts were amended by an act passed at the October session, 1846, of the General Assembly; that the defendant is a duly chartered railroad corporation under the laws of Rhode Island, and successor to the New York, Providence & Boston Railroad Company, and subject to the duties, liabilities, and obligations imposed by said acts upon the latter corporation. The declaration, while reciting the said acts of 1832 and 1836, is silent in regard to the act of 1846. At the trial of the case the plaintiff introduced in evidence the aforesaid acts of 1832 and 1836, and offered in evidence the said act of 1846, against the objection of the defendant upon the ground that it was not set out in the declaration. The defendant contends that there is a hiatus between the two parts of the declaration, and that no connection is shown between the railroad operated by the New York, Providence & Boston Railroad Company, and leased to the defendant, and the railroad running along by the plaintiff's ice-houses. That is, the defendant objects that the plaintiff does not set forth in its declaration the act passed by the General Assembly under which the predecessor of the defendant constructed the railroad which the plaintiff in said declaration describes as "near to, and not far distant from, said premises and buildings of the plaintiff." The plaintiff claims that it was not necessary to plead it in the declaration, because it is a public statute, and therefore one of which the court would take judicial notice. The presiding justice admitted said act of 1846, and the defendant duly excepted. We find no variance in that respect between the declaration and the proof. The original charter and its amendments were properly admitted under the declaration. Gen. Laws R. I. 1896, c. 26, § 15, provides: "Every act of incorporation shall be so far deemed a public act that the same may be declared on and given in evidence, without specially pleading the same."

Whether the defendant is liable, under section 2 of the act of 1836, for the fire which is the subject-matter of the suit, depends upon the construction to be placed upon section 9 of the act of 1846, which reads as follows: "Sec. 9. Said railroad, when the same shall have been constructed, shall be managed, governed and protected, in all respects by the provisions of the charter and amendments heretofore granted to the New York, Providence and Boston Railroad Company." One of the definitions of the word "govern" given by Webster's International Dictionary is "to regulate by authority"; another, "to direct or control." To be "governed," therefore, is to be regulated by authority, or to be directed or controlled; and one regulated, directed, or controlled by authority of another is subject to that other. While the words chosen may not be as apt as others that might be suggested as more commonly in use on such occasions, we have no doubt that the provisions of the act of 1836 governed the amend-

Gorham Mfg. Co. v. New York, etc., R. Co

ment of 1846, and that said last-mentioned act was subject to the provisions of the charter and amendments thereto. The act of 1846 empowered the New York, Providence & Boston Railroad Company to locate, lay out, and construct a railroad, in extension of their railroad then located and constructed, within certain limits, in such a manner as to enable them to connect it with the railroad of the Providence & Worcester Railroad Company, or with the railroad of the Boston & Providence Railroad Company upon the cove in the city of Providence; and while said act contains ample provision for said location, lay-out, and construction, it contains no original provision defining the rights and privileges or duties and liabilities of the corporation over and concerning this particular portion of the railroad; nor was it necessary, as this had been attended to in the proper place, viz., in the charter of the road and the amendment thereto contained in the acts of 1832 and 1836. It was sufficient to do what was done in the act in section 9—simply to refer to the provisions of the charter and amendments theretofore granted to the railroad for the management, government, and protection in all respects of said railroad when constructed. We find, therefore, that the defendants would be liable, under the provisions of section 2 of the act of 1836, for all damages arising from the burning of houses, etc., by fire communicated from the engines, etc., of the corporation.

Is the verdict against the evidence? The evidence was conflicting and largely circumstantial. Therefore it was peculiarly within the province of the jury. There is evidence tending to support the verdict, and we cannot say that the preponderance of the evidence does not support it, and there is nothing to indicate that the jury were improperly affected by passion or prejudice. The amount of the verdict indicates that the jury adopted the figures given by the witnesses for the defendant as the amount of damage sustained by the plaintiff, instead of the larger sum claimed by the plaintiff and testified to by its witnesses.

The defendant took exception to a ruling of the presiding justice allowing a question to be put to and answered by Robert F. Barbour, a witness for the plaintiff, as follows: "Question. I will ask you when you went up there, on the 2d, to clean out the gutters, whether or not you observed any cinders on the roof or in the gutters? Answer. Cinders always on the roof." The defendant claims that this was error upon the part of the presiding justice, and relies upon the same as a ground for a new trial. It appears from the record that the question related to the day before the fire complained of, and that the objection was made upon the ground that the question was impertinent and immaterial. It was both pertinent and material to prove that burning coals could be carried from defendant's locomotive to and upon the roof of the building where the fire originated, and, as live coals become cinders after the fire leaves them, proof of the

Chicago Union Traction Co. v. Leach

presence of spent missiles of fire in a given locality is admissible as tending to show the possibility of a fire being thus communicated at that distance from a locomotive. *MacDonald v. N. Y., N. H. & H. R. Co.*, 25 R. I. 40, 54 Atl. 795.

Petition for new trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

CHICAGO UNION TRACTION CO. v. LEACH.

(Supreme Court of Illinois, April 17, 1905.)

[74 N. E. Rep. 119.]

Collision between Street Car and Other Vehicle—Injuries to Occupant—Negligence and Imputed Negligence.*—Where plaintiff was injured in a collision between a street car and a closed carriage in which she was riding, the railway company was not relieved from liability for its negligence merely because the driver of the carriage, over whose actions plaintiff had no control, was also negligent in turning across the track.

Same—Same—Liability—Instructions.†—Where, in an action for injuries to plaintiff while riding in a closed carriage, in a collision with a street car, the court charged that, if there was no negligence on the part of the defendant in operating the car, it was not liable, and, if the sudden turning of the horses and carriage across the track in front of the car was not reasonably to be expected, then it was defendant's duty to stop the car only as soon as its servants had notice that the horses were being so turned, etc., defendant was not prejudiced by the refusal to charge that, if the sole cause of the injury was the negligent manner in which the horses were driven, defendant was not liable.

Appeal from Appellate Court, First District.

Action by Minnie E. Leach against the Chicago Union Traction Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant.

Waters, Johnson & Baker, for appellee.

*For the authorities in this series on the subject of imputed negligence, see *Evensen v. Lexington & B. St. Ry. Co.* (Mass.), 14 R. R. R. 159, 37 Am. & Eng. R. Cas., N. S., 159; foot-notes appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1.

†As to care required of those in charge of street cars to avoid collisions with other users of streets, see *Christy v. Des Moines City Ry. Co.* (Iowa), 14 R. R. R. 42, 37 Am. & Eng. R. Cas., N. S., 42; foot-notes appended to *Rhymes v. Jackson Electric Ry. L. & P. Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Searles v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781; foot-notes appended to *Holden v. Missouri R. Co.* (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440; *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91.

Chicago Union Traction Co. v. Leach

CARTWRIGHT, J. The Appellate Court for the First District affirmed a judgment for \$3,000 recovered by appellee in the superior court of Cook county against appellant for damages on account of injuries received by her in a collision between a car of appellant and a closed carriage in which she was riding. This appeal was prosecuted from the judgment of the Appellate Court.

Plaintiff and her husband were in the carriage, and the driver was an employee of the liveryman from whom it was hired. Neither plaintiff nor her husband gave any direction to the driver, except to tell him where they were to be taken. They had attended a funeral, and the carriage had stopped on the south side of Van Buren street, about 20 feet east of the point where California avenue crosses it. The team stood facing toward the east while a woman got out and left the carriage. It was in the dusk of evening, and the car was approaching from the west when the driver turned the team around across the tracks of the defendant in a northwesterly direction, to go north on California avenue. The carriage was struck by the car, and, although it was not overturned or wrecked, plaintiff was thrown against the side of the carriage and injured.

The negligence alleged in the declaration was that the car was run without sounding a gong or giving any warning to the plaintiff, and the plea was the general issue. The evidence for the plaintiff tended to prove the negligence charged in the declaration, and the testimony was in irreconcilable conflict. The evidence for the defendant tended to disprove the charge of negligence, and also tended to prove that the accident was caused by the unexpected and negligent act of the driver of the carriage in suddenly turning his team around to the north, across the track and in front of the car, when the car was so near that it could not be stopped. If the evidence for the defendant on that subject were credited, the rule of law stated in *Chicago Union Traction Co. v. Browdy*, 206 Ill. 615, 69 N. E. 570, would be applicable. The defendant would not be relieved from liability to the plaintiff, if it was guilty of negligence, merely on the ground that the driver of the carriage in which she was riding was also negligent in turning across the track. *Wabash, St. Louis & Pacific Railway Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; *Chicago City Railway Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; *Chicago & Alton Railroad Co. v. Vipond*, 212 Ill. 199, 72 N. E. 22. But if the accident was solely attributable to the negligence of the driver in turning across the track when the car was too near to enable the motorman to stop it, there would be no negligence of the defendant and no liability. Upon that theory of the case the defendant asked the court to give to the jury the following instruction: "If the jury believe from the evidence, under the instructions of the court, that the sole cause of the injury to the plaintiff was the

Chicago Union Traction Co. v. Leach

negligent manner in which the horses and carriage in question were driven or managed, if you believe from the evidence that such horses and carriage were negligently driven or managed, then it is the duty of the jury to find the defendant not guilty." The court refused to give the instruction, and the refusal is the only ground of complaint in this court. The instruction correctly stated the law applicable to the hypothesis of fact contained in it, and the defendant was entitled to have the jury instructed on that subject. We are of the opinion, however, that the judgment should not be reversed on account of the refusal to give the instruction, for the reason that the rule of law was fairly presented to the jury by another instruction. There were several instructions of a general nature stating the rules of law which are applicable to every case where negligence is charged, but which were not directly and specifically applied to the facts of this case. The sixth was of that character, and stated that if the defendant exercised ordinary care to avoid injuring the plaintiff, but that nevertheless the plaintiff was injured, the jury should find the defendant not guilty. The sixteenth stated to the jury that, if the accident occurred without negligence on the part of the defendant, they should find the defendant not guilty; and the seventeenth told them, if there was no negligence on the part of the defendant in operating the car, they should find it not guilty. While those instructions were correct, they were scarcely more specific than any statement of an approved rule of law, and a party is entitled to instructions which apply directly and specifically to his theory of the facts which there is evidence tending to prove. *Chicago, Burlington & Quincy Railroad Co. v. Camper*, 199 Ill. 569, 65 N. E. 448; *Mallen v. Waldowski*, 203 Ill. 87, 67 N. E. 409. The fifth instruction, however, was specific, and, we think, fairly presented to the jury the rule of law invoked by the defendant, and which the evidence in its behalf tended to prove. It stated, in substance, that the defendant was not obliged to be all the while on its guard against occurrences or conduct not reasonably to be expected, and that if the jury believed from the evidence that the sudden turning of the horses and carriage across the track in front of the car, if they were so turned, was, under all the circumstances in evidence, not reasonably to be expected, and as the car approached the place it was being operated with ordinary care, then it became the duty of defendant to stop the car only as soon as the servant or servants in charge thereof had notice or knowledge that the horses and carriage were being turned across the tracks in front of the car, and if such notice or knowledge came too late to stop the car, in the exercise of ordinary care, without injuring the plaintiff, the jury must find the defendant not guilty. That instruction contained a fair statement of the defendant's theory of the case, and of the facts which its evidence tended to prove.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

LARONDE *v.* BOSTON & M. R. R.

(Supreme Court of New Hampshire, Merrimack, April 4, 1905.)

[60 Atl. Rep. 684.]

Injury to Horse in Street—Negligence of Motorman—Question for Jury.*—Evidence in an action for the killing of a horse by a street car held sufficient to go to the jury on the question of the negligence of the motorman.

Horse Wrongfully at Large—Care Required of Motorman.†—Though a horse killed by a street car was wrongfully in the street, the railway company is liable therefor if the accident could have been prevented by the motorman exercising ordinary care.

Exceptions from Superior Court; Wallace, Judge.

Action by George W. Laronde against the Boston & Maine Railroad. Defendant excepted to rulings. Exceptions overruled.

Case for negligently running against and killing the plaintiff's horse. Trial by jury. The defendants' motions, made at the close of the plaintiff's evidence, for orders directing a nonsuit and a verdict in their favor, were denied subject to exception. The case was then taken from the jury with an agreement that, if there was sufficient evidence to warrant its submission to the jury, the plaintiff should have judgment for \$150 and costs; if not, the defendants should have judgment. The plaintiff's evidence tended to prove the following facts: The defendants' Concord and Manchester street railway branch runs in a northerly and southerly direction through Main street in the village of Suncook. Cross street enters Main street from the west. The railway track is straight for a distance of 580 feet northerly of the intersection, and a person can see from a point that distance away to Cross street in a clear day. The plaintiff, who is a grocer, has a stable on Cross street, 50 to 70 feet distant from Main street, and his place of business is on Main street north-

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see *Christy v. Des Moines City Ry. Co.* (Iowa), 14 R. R. R. 42, 37 Am. & Eng. R. Cas., N. S., 42; foot-notes appended to *Rhymes v. Jackson Elec. Ry., L. & P. Co.* (Minn.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Searles v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781; foot-notes appended to *Holden v. Missouri R. Co.* (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440; *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91.

As to the care required of trainmen to avoid collisions with stock, see foot-note appended to *Nashville & K. R. Co. v. Davis* (Tenn.), 13 R. R. R. 432, 36 Am. & Eng. R. Cas., N. S., 432.

†As to the liability of a railroad company for killing stock unlawfully at large, see *Seaboard Air-Line Ry. v. Collier* (Ga.), 8 R. R. R. 702, 31 Am. & Eng. R. Cas., N. S., 702; *Wright v. Minneapolis, etc., Ry. Co.* (N. Dak.), 9 R. R. R. 471, 32 Am. & Eng. R. Cas., N. S., 471.

Laronde v. Boston & M. R. R.

erly of Cross street. At 6 o'clock in the morning of December 18, 1903, his servant hitched the horse in question into a grocery wagon, and left the team unattended while he harnessed another horse. The horse started, and walked to Main street, and there turned northerly, and walked on or near the defendants' railway track about 100 feet, when one of the defendants' electric cars, then due at that place upon a regular trip in a southerly direction, and going at its usual speed of about 15 miles an hour, ran against and killed the horse. The servant saw the horse as he turned the corner into Main street, and another witness saw him turn the corner and observed the approaching car, then 300 to 400 feet distant. It was fairly light, but not full daylight. Two witnesses testified that it was a clear morning, and one—who was upon the car—that there was a fog so dense that a person could see only 30 feet in front of the car. The headlight of the car was lighted, but the arc lights were not. If the latter had been lighted, the motorman might have seen a short distance farther. The car could be stopped in going 20 or 30 feet.

Almon F. Burbank, for plaintiff.

John M. Mitchell, for defendants.

CHASE, J. The negligence with which the plaintiff charges the defendants is the failure of their motorman seasonably to discover the perilous position of the horse and stop the car. It cannot be doubted that the evidence was sufficient to sustain a finding of such negligence. It was the duty of the motorman to keep watch of the track ahead of his car to avoid collisions with objects that might be upon the track, whether rightfully or wrongfully. The law imposed the duty upon him for the safety of persons both upon the highway and upon the car. Indeed, his own safety depended upon its faithful performance. If the light was dim, and the weather was foggy, greater watchfulness and care would be needed to bring his conduct up to the standard of ordinary care than if it was light and clear. At the time of the collision the car was passing over a straight piece of track, 580 feet long, the whole length of which the motorman could see from the moment of entering upon it, if the light was sufficiently strong and the weather was clear. The testimony regarding the weather was conflicting, but it is sufficient for the present purpose that the jury might properly have found that it was clear. Besides the direct evidence that it was clear, there was the testimony of a witness that he saw the horse as he turned into Main street, and at the same time saw the car approaching 300 or 400 feet away. But if the jury found that the weather was densely foggy, they might reasonably find, also, that so large an object as a horse hitched to a grocery wagon could be seen when at a distance from the car sufficient to enable the motorman to stop the car before colliding with the team; or, if not, that it was negligence to run a car in a village highway in such weather at a speed of 15 miles an hour. If, as the defendants say, the horse

Birmingham Southern Ry. Co. v. Liutner

was wrongfully in the highway, the fact would not relieve them from responsibility for the injury in case it was caused by their negligence. In that event their wrong would consist of negligently injuring the plaintiff's horse while carelessly exposed to danger and the plaintiff was not present. The law would not justify the defendants injuring the horse under such circumstances by their negligent acts, any more than it would if their acts were intentional. The only question would be whether they could have prevented the injury by an exercise of ordinary care. If they could, their negligence would be, in law, the sole cause of the injury. "He who cannot prevent an injury negligently inflicted upon * * * his property by an intelligent agent, 'present and acting at the time,' * * * is legally without fault, and it is immaterial whether his inability results from his absence, previous negligence, or other cause." *Nashua Iron & Steel Co. v. Railroad*, 62 N. H. 159, 163; *Felch v. Railroad*, 66 N. H. 318, 29 Atl. 557; *Edgerly v. Railroad*, 67 N. H. 312, 36 Atl. 558; *Mitchell v. Railroad*, 68 N. H. 96, 34 Atl. 674; *Gallagher v. Railway*, 70 N. H. 212, 47 Atl. 610; *Parkinson v. Railway*, 71 N. H. 28, 51 Atl. 268; *Carney v. Railway*, 72 N. H. 364, 370, 57 Atl. 218.

Exceptions overruled; judgment for the plaintiff for \$150 and costs. All concurred.

BIRMINGHAM SOUTHERN RY. CO. v. LINTNER

(Supreme Court of Alabama, Dec. 2, 1904.)

[38 So. Rep. 363.]

Injury to Wife—Action by Husband—Damages.*—Where the wife is injured in her person by the wrongful act of a stranger, the husband is entitled to recover from the wrongdoer the expense to which he is put in the alleviation of her sufferings and the cure of her hurts, as well as for any impairment of the right of consortium by a non-fatal injury, notwithstanding Code 1896, § 2521, providing that the earnings of the wife are her separate property, but that she is not entitled to compensation for services rendered to or for the husband.

Same—Same—Same—Pleading.—Where a married woman was injured in a collision with a railroad engine while attempting to drive across its tracks, her husband's claim for damages for impairment of his right of consortium and expense to which he was put in the alleviation of her sufferings and care of her hurts, as well as for injuries to his horse, vehicle, and harness in the collision, was properly laid in one complaint, and all in each count of the complaint.

Accident at Crossing—Signals—Burden of Proof—Application of Statute.—Code 1896, § 3443, providing that a railroad company is liable for all damages done to persons or to stock or other property,

*As to the elements of damages recoverable by husband or wife for death or injuries to the other, see foot-note appended to *Smith v. Lehigh Valley R. Co.* (N. Y.), 11 R. R. R. 746, 34 Am. & Eng. R. Cas., N. S., 746, where all the preceding authorities in this series are collected.

Birmingham Southern Ry. Co. v. Lintner

resulting from a failure to comply with the statutes requiring certain signals to be given on approaching crossings, and that, when any person or stock is killed or injured or other property damaged by the locomotive or cars of any railroad at any crossing, the burden of proof in any suit therefor is on the railroad company to show compliance with the statutes, and that there was no negligence on its part or on the part of its agents, is applicable in an action by a husband for injury to his wife and personal property in a crossing accident, as well in the case of injury to her person as in that of injury to the property.

Injury to Wife—Action by Husband—Evidence.—In an action against a railroad for injuries to plaintiff's wife in a crossing accident, evidence is admissible to show that the wife is still suffering from the injuries at the time of the trial, though the right of action for such suffering, in and of itself, is by statute vested in her.

Witnesses—Impeachment.—The refusal of the court to permit inquiries of a witness as to the relation of attorney and client between the witness and an attorney for the plaintiff, to show bias of the witness against the defendant, is not an abuse of discretion.

Accident at Crossing—Contributory Negligence.—When a person stops and listens for a train at a crossing, contributory negligence cannot be based on a mere failure of such person to hear an approaching train.

Injury to Wife—Action by Husband—Damages.—In an action by a husband for injuries to the wife, the husband is not entitled to recover for any loss of the services of his wife which may occur in the future because of the injuries inflicted by the defendant.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by William Lintner against the Birmingham Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

It is averred in each of the counts of the complaint that the plaintiff's wife, Clara Lintner, was in a buggy drawn by the horse, driving along a street in or near the town of Ensley, and as she drove across the track of the defendant which crossed said street, the said engine ran upon or against said horse and vehicle, and threw the plaintiff's wife from the vehicle, whereby she was severely injured in her person and was made sick. It was then averred in each of the counts of the complaint that, as a proximate consequence of such injuries and sickness of the plaintiff's wife, "he lost the services and society of his said wife for a long time, and will likely continue to lose her said services and society for a long time, and he was put to great trouble, inconvenience, and expense for medicine, medical attention, care, and nursing in or about his efforts to heal and cure the said wife's said wounds, injuries, and sickness." It is further averred in each of said counts that said vehicle was broken or otherwise injured, and the harness by which the horse was attached to said vehicle was greatly injured and damaged, and the horse was injured, for all of which damages the plaintiff claims \$5,000.

The defendant moved the court to strike out of each count of the complaint the portions thereof which claimed damages on account of the loss of the services and society of the wife of the

Birmingham Southern Ry. Co. v. Lintner

plaintiff, upon the ground that the plaintiff is not entitled to the services of his wife under the laws of the state of Alabama, and that the complaint shows he has not lost the society of his wife, because she was living at the time of the complaint. The defendant moved to strike from each count of the complaint that portion of each count which claimed damages on account of the trouble, inconvenience, and expense incurred by the plaintiff for medicine, medical attention, and nursing of his wife, upon the ground that his wife was legally liable, by the laws of the state, for such expenses. Each of these motions was overruled by the court, and to each of these rulings the defendant duly excepted. The defendant then demurred to each of the counts of the complaint upon the ground that the plaintiff's wife was at the time of the injury complained of a married woman, and entitled, under the laws of Alabama, to sue for and recover all damages which may have been sustained for the personal injuries complained of in said count, and because the plaintiff's wife was liable for the expense for medical attention, care, and nursing, and because the plaintiff has no claim under the laws of Alabama for the services of his wife, and no legal claim upon his wife for such services, and because it was shown by the averments of the complaint that the plaintiff had not lost the comfort, companionship, or services of his wife, in that at the time of filing said complaint she was living. The defendant also demurred to each of the counts of the complaint upon the ground that in each of said counts there was a misjoinder of action, in that in each of said counts the plaintiff sought to recover for the loss of the services of his wife, and also for damages for the loss, destruction, and injury of personal property. The court overruled each of these demurrers to the complaint, and to each of these rulings the defendant duly excepted. The defendant then pleaded the general issue, and by special plea set up the contributory negligence on the part of the plaintiff's wife, in that she negligently drove the horse and vehicle upon the track of the defendant, in front of a moving locomotive.

Plaintiff was the husband of Clara Lintner. On October 31, 1901, she had driven in a buggy to the place where her husband worked, to carry him to his work at the steel plant. She then started home, and in crossing the railroad of the appellant the horse and buggy were run into by an engine of the appellant on a public road crossing. The buggy was broken up, and the horse slightly injured. The horse and buggy were the property of the appellee. Clara Lintner, wife of the appellee, was also injured. The extent of her injury was a disputed question. She claimed serious injury. This, however, was contradicted by the attending physician. She was in bed for a while—about one week—and testified that she had not entirely recovered at the time of the trial. The evidence of appellee tended to show that, before Clara Lintner started on the track of the appellant, she stopped and looked and listened. The evidence of appellant

Birmingham Southern Ry. Co. v. Lintner

tended to show that she did not stop and look and listen, but that she drove straight on across the track at a fast speed, without pausing at all. During the examination of the wife as a witness, and after she had testified to having sustained serious injuries, which prevented her from attending to her household duties, and made it necessary for her husband to employ another person to do the work about the house, she was asked the following question: "Are you still suffering from the injury?" The defendant objected to this question upon the ground that, if the plaintiff could recover for the services of his wife at all, it was only up to the date of the filing of the complaint. The court overruled the objection, and the defendant duly excepted. Upon the cross-examination of Peter F. Goss, a witness for the plaintiff, he was asked by the defendant if he had not sued the Louisville & Nashville Railroad Company on account of an accident. The court sustained the plaintiff's objection to this question, and to this ruling the defendant duly excepted. Thereupon the defendant asked the witness the following question: "Mr. Harsh [the attorney for plaintiff in the pending suit] was your attorney in that case, was he not?" The plaintiff objected to this question. The court sustained the objection, and the defendant duly excepted.

The defendant requested the court, among others, to give to the jury the following written charges, and separately excepted to the court's refusal to give each of said charges as asked:

"(c) The court charges the jury that if they believe from the evidence that Mrs. Clara Lintner could hear ordinarily well, and that she drove up to the crossing, and stopped and looked and listened before she started across, and did not hear the engine coming, and that this contributed proximately to the accident, then they must find a verdict for the defendant."

"(13) The court charges the jury that, even if they should find a verdict for plaintiff for and on account of the loss of services of his wife, they cannot allow anything for loss of such service subsequent to the filing of the complaint in this suit."

"(17) The court charges the jury that plaintiff cannot recover in this action for any losses of the services of his wife which may occur in the future."

There were verdict and judgment for the plaintiff, assessing his damages at \$500.

A. G. & E. D. Smith, for appellant.

Bowman, Harsh & Beddow, for appellee.

MCCLELLAN, C. J. "The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family." Code 1896, § 2521. The whole scope and purpose of this enactment manifestly are to vest in the wife her earnings in services rendered to third persons, strangers to the household. It in no degree emancipates her from her household duties, nor au-

Birmingham Southern Ry. Co. v. Lintner

thorizes her to enter upon such alien service as would conflict with and prevent the performance of her duties incident to the domestic establishment; the care, comfort, and convenience of the family—the duties, in short, which before the statute she owed to the husband as the husband and head of the family. These duties she owes now just as she did at the common law, and while the husband may allow her to pretermitt them and engage wholly or to any less extent in outside service, the earnings of which belong to her, without such emancipation by the husband she owes these services to him now as before, and for any wrongful act of a stranger which deprives him of them he is entitled to recover for the consequent loss and injury. Nor does this or any other statute absolve the husband from the duty of caring for the wife “in sickness and in health.” If she be injured in her person by the wrongful act of a stranger, a proximate, legal consequence of such injury is the expense to which the husband is put in the alleviation of her sufferings and the cure of her hurts; and such expense is a loss to the husband, for which the wrongdoer is answerable to him in damages. 15 Am. & Eng. Ency. Law, p. 861; *Henry and Wife v. Klopfer*, 147 Pa. 178, 23 Atl. 337, 338; *Tuttle v. C.*, R. I. & P. R. R. Co., 42 Iowa, 518; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Douglas v. Gausman*, 68 Ill. 170.

The husband also, of course, has a legal right to the society of the wife, involving all the amenities and conjugal incidents of the relation. This right of society may be invaded by an act which, while leaving to the husband the presence of the wife, yet incapacitates her for the marital companionship and fellowship; and such incapacity may be deprivation of her society, differing in degree only from total deprivation by her death. For such impairment, so to say, of the wife's society, of his right of consortium—such deprivation of the aid and comfort which the wife's society, as a thing different from mere services, is supposed to involve—he is entitled to recover.

It may be stated as a very general if not universal proposition that one who is entitled to sue at all for the consequences of a wrongful act may recover all the damages that such act has proximately inflicted upon him. His cause of action is the one wrongful act of the defendant. We know of no principle of law or decided case which requires him to split this one cause of action into two or more because the injuries he sustains may be diversified in character. To the contrary, he must lay all he has suffered in one action, or, failing in that, he foregoes his claim for such part of the injury as he does not count upon. The alleged wrongful act complained of here inflicted damnifying injuries (that is, injuries damnifying to the husband) upon the person of his wife, and it also injured or destroyed certain property of the husband (his horse and buggy, which his wife was using at the time of the alleged collision). Very clearly the claim of damages for all these injuries was properly laid in one

Birmingham Southern Ry. Co. v. Lintner

complaint, and all in each count of the complaint. The case of *Brunsdon v. Humphrey*, 14 Q. B. (L. R.) 141, relied on for appellant, in this connection, holds that two actions may be brought when the same negligent act results in injury to the person and to the property of the plaintiff, but it does not hold that damages for both the personal and property injury could not be recovered in one and the same action. To the contrary, that a recovery might be had for both in one count is apparently conceded in the opinions of both Brett, M. R., and Bowen, L. J., and the other member of the court, Lord Chief Justice Coleridge, repudiated the opinions of both his associates, and holds that only one action could be maintained. To our minds the conclusion of Lord Coleridge is eminently correct, and our own cases are in accord with it. *Foster v. Napier*, 73 Ala. 595; *S. & N. Ala. R. Co. v. Henlien*, 56 Ala. 368; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228.

It is, of course, no objection to a count for personal injuries and for injuries to property that different evidence has to be resorted to in proof of the respective claims—any more, indeed, than where the claim is for injuries to two or more items of property, as a horse and a buggy and the harness attaching the one to the other. So the consideration that the burden of proof of the wrong as to personal injuries may be upon one party, while, as to the injury to property, it may be upon the other, does not enforce the conclusion that both claims cannot be laid in one count. Such a state of things could be easily accommodated in the charge of the court, so as to present no difficulty in the way of a proper verdict. Hence our conclusion that the suggestion made for appellant that on the claim in this complaint, which is rested on the loss of the wife's services and society, it was upon the plaintiff to prove defendant's negligence, while, as to the injury to property, the fact of injury by collision with defendant's engine being shown, defendant's negligence is presumed, and the burden is upon it to overturn that presumption by proof of due care and diligence, is not of importance, even assuming that the burden of proof is differently placed in respect of the two classes of injuries. But in our opinion, this is not the legal fact. The assumption is unfounded. Under section 3443 of the Code 1896, the presumption of defendant's negligence arose as well in respect of the injuries to the person of plaintiff's wife as in respect of the injury to his property, and that presumption obtained on the trial of his claim for damages, consequent upon the injuries to her person, for the loss of her services and society, and for the expense he was put to in her care and treatment. The statute, in other words, characterizes the act as *prima facie* negligent, for all the purposes of actions, by whomsoever instituted, for the recovery of damages proximately resulting therefrom.

Upon the theory of the case, viz., that plaintiff suffered the loss or impairment of his wife's services and society in consequence of the injuries inflicted upon her, the extent and duration

Birmingham Southern Ry. Co. v. Lintner

of her injuries had a direct bearing upon the extent of his loss to be measured by the jury in their assessment of his damages; and the court properly received evidence to the effect that she was still suffering from the injuries. It is quite true that the right of action for this suffering, in and of itself, is by statute vested in her; but that is not to say that the husband is without redress for the damnifying collateral consequences of her hurts to him.

It will suffice to say, in respect of the declination of the court to allow inquiries into the relations of client and attorney between the witness Goss and the attorneys for this plaintiff, the purpose of which was to show bias of this witness against this defendant, at least, cannot be affirmed to be an abuse of the court's discretion in such matters.

Charges which proceeded on the idea that Mrs. Lintner was guilty of contributory negligence, in that she failed to hear the train when she stopped and listened for it, were properly refused. *K. C., M. & B. R. Co. v. Weeks*, 135 Ala. 614, 621, 34 South. 16.

Charge 17 requested by defendant should have been given. Nothing was claimed or could be recovered for the pain and suffering and physical incapacity, past, present, or future, of Mrs. Lintner herself, considered as elements of damages sustained by her. Recovery here could be had only for the consequential results of her injuries, which inflicted damages upon the husband. In respect of her services and society, and the loss or impairment thereof to her husband, he was entitled to recover to the extent of such loss or impairment, in point of time and degree. There was evidence of such loss or impairment up to the trial, and of the consequent damages to the plaintiff; but there was no evidence that such deprivation would continue beyond the trial, and no data whatever was afforded by the evidence upon which the jury could assess the extent or quantum of future damages to plaintiff from future loss of her services. Upon this state of case, the court should have instructed the jury, as requested by the defendant, "that plaintiff cannot recover in this action for any losses of the services of his wife which may occur in the future."

Reversed and remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

DEMKO v. CARBON HILL COAL CO.

(Circuit Court of Appeals, Ninth Circuit, February 6, 1905.)

[136 Fed. Rep. 162.]

Logging Railroads—Maintenance—Care Required.*—A corporation operating a logging road solely for its own purposes, and on which no freight or passengers are carried, is not required to maintain the road with the same degree of care as is required of commercial railroads.

Same—Injuries to Servant—Contributory Negligence.†—Where a brakeman on a logging railroad was injured by the derailment of one of the cars while he was riding on the floor of the rear end of the engine, with his feet hanging between the engine and the first car, and there was no reason why he could not have occupied a seat in the cab of the engine, as he had been directed to do, where he would have been safer than in the place selected by him, and where he would not have been injured, he was guilty of contributory negligence, precluding recovery.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

Govnor Teats and J. H. Easterday, for plaintiff in error.

James M. Ashton, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error owned and operated coal mines, and in connection therewith owned and operated a narrow-gauge road about a mile in length for hauling timbers for props in the mines. For this purpose it used a small engine of about 7 tons in weight, and logging trucks, about 10 feet long, weighing about 1,300 pounds each. The engine was provided with two seats, one on each side, in an inclosed cab at the rear end. One seat was for the engineer, and one for an employee called a brakeman, whose duty it was to keep the track sanded, to assist in loading and unloading the lumber, and to obey the orders of the engineer. The plaintiff in error had occupied the place of brakeman for about a week or ten days prior to the accident which is complained of. He had been over the road about 50 times. The rate of speed was from three to four miles an hour. The trucks were often derailed by small rocks falling on the track from the sides of a cut about 60 feet long and 6 or 7 feet in height, through which the track passed, the stones being dislodged by passing cattle and horses. The engineer and brakeman were accustomed to look out for these stones and remove them. When the trucks were derailed

*See foot-notes appended to *Healy Lumber Co. v. Morris* (Wash.), 12 R. R. R. 171, 35 Am. & Eng. R. Cas., N. S., 171, where all the authorities in this series on the subject of logging railroads are collected.

†As to contributory negligence and assumption of risks where employees violate rules and orders, see foot-notes appended to *McMillan v. Grand Trunk Ry. Co.* (C. C. A.), 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712.

Demko v. Carbon Hill Coal Co

thereby, they put them back on the track by means of a peavy. On the morning of the accident the engineer and the plaintiff in error were proceeding from the mines to the timber. The engine was going backward, and was pushing before it two trucks. A drawbar connected the engine with the first truck. The plaintiff in error was seated on the floor of the rear end of the engine, with his feet hanging between the engine and the first truck. When passing through the cut the trucks were derailed, probably by some small stones on the track. The drawbar was broken, and the first truck was thrown around so as to catch the foot of the plaintiff in error, whereby he sustained serious injury. He brought the present action to recover damages, alleging negligence in the defendant in error, in that it had not properly constructed its road through the cut, and had not made provision against the falling of stones on the track. At the close of the testimony, the court directed the jury to return a verdict for the defendant in error.

The evidence was that the plaintiff in error was accustomed to ride on the front end of the engine when the weather was fair, and in the cab with the engineer when it was rainy. There is no evidence as to the weather on the day of the accident. The plaintiff in error testified that he sat where he did for the reason that the floor space between his seat and that of the engineer was filled with fuel. He did not say nor prove that he could not have ridden inside. That he could have ridden there, seems to be indicated by the photographs which he introduced in evidence. The evident reason was that his seat was occupied by a man, not in the employ of the defendant in error, who was riding in the cab with the permission of the engineer and of the plaintiff in error. No satisfactory reason was shown for occupying the dangerous position in which the plaintiff in error was when he was hurt. He did not deny that he had been cautioned to be careful, and had been told by the foreman that inside the cab was the proper place for him to ride. It was his duty to have demanded the place which the stranger was occupying in the cab, or, in any event, to have found a safe place in the engine or elsewhere. No reason is shown why he could not have ridden on the front end of the engine. The defendant in error in its answer relied on the defense that the injuries sustained by the plaintiff in error were caused solely through his carelessness and negligence, and such seems to have been the ground on which the court instructed the jury to return the verdict.

The defendant in error is not to be held to the same accountability in constructing a logging road used solely for its own purposes, and on which no freight or passengers are carried, that would apply to the case of an ordinary railroad. *Williams v. The Northern Lumber Co.* (C. C.) 113 Fed. 382; *Wade v. Litcher & Moore Cypress Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255. But whatever may be the rule applicable to the owner of such a road for negligence in constructing the

Mullin v. Northern Pac. Ry. Co

same, it seems clear that the plaintiff in error was guilty of contributory negligence in unnecessarily occupying an obviously dangerous position. In the case of *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, the plaintiff was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were conveyed by the company to and from their place of work in a box car assigned for their use. The plaintiff, on returning from work one evening, rode on the pilot or tender of the locomotive, when the train passed through a tunnel and collided with cars standing on the track. There was room for him in the box car, and he had been warned of the danger of riding as he did. It was held that he was not entitled to recover, for the reason that he had not used ordinary care and caution. Said the court:

"The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. * * * The plaintiff was not entitled to recover."

The doctrine of that case was affirmed and applied in *St. Louis &c. Railway v. Schumacher*, 152 U. S. 77, 14 Sup. Ct. 479, 38 L. Ed. 361.

The judgment is affirmed.

MULLIN v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, April 29, 1905.)

[80 Pac. Rep. 814.]

Fellow Servants—Safe Place to Work.*—Plaintiff, who was employed by defendant to clean engines in a roundhouse, was injured by the negligence of another employee in running another engine over the pit in which plaintiff was at work, and bumping such engine into the engine on which plaintiff was working. Held, that plaintiff and such other employee, though working for a common employer, were not fellow servants.

Same—Same.*—The negligence of such servant was the negligence of the master in making dangerous the place furnished plaintiff in which to work.

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Action by John Mullin against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Grosscup and *A. G. Avery*, for appellant.

F. R. Baker, for respondent.

*See foot-note appended to *Jones v. Kansas City, etc., R. Co. (Mo.)*, 10 R. R. R. 364, 33 Am. & Eng. R. Cas., N. S., 364; *Hamilton v. Michigan Cent. R. Co. (Mich.)*, 12 R. R. R. 365, 35 Am. & Eng. R. Cas., N. S., 365; foot-notes appended to *McLean v. Pere Marquette R. Co. (Mich.)*, 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544.

Mullin v. Northern Pac. Ry. Co

DUNBAR, J. Accepting appellant's statement, this action was brought to recover damages on account of injuries received by plaintiff while in the employ of the defendant railway company. Plaintiff was employed as a fire knocker at the roundhouse of the company, and worked in what is known as the "cinder pit." The pit extended the full width under the railroad track, and upon this track engines were "spotted" over the pit for the purpose of having fire boxes cleaned and cinders raked out. The plaintiff was cleaning the cinders out of one of the engines which had been moved upon this track, and spotted over the pit. Two large engines could be put over the pit at once. Plaintiff, in the course of his duty, had some difficulty in making the damper stay up, and reached out with his right hand over the track underneath the engine wheel for a block of wood to prop it up. Just at this instant George Thompson, in spotting another engine over the pit, bumped it into the engine on which plaintiff was working, moving it a few inches, and catching plaintiff's hand between the wheel and the track, and causing the injury which was complained of. The trial resulted in a verdict for the plaintiff. Judgment was entered in accordance with the verdict, and the appeal is taken from such judgment.

The principal contention embodied in most of the assignments of error is that the appellant is not responsible to the respondent in this action, for the reason that the injury was caused by the negligent act of a fellow servant. This contention cannot prevail, under the decisions of this court generally, and especially under the rule announced in *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727, where it was held that a millwright employed to make repairs and alterations about a mill, and a sawyer engaged in operating a saw therein, are not fellow servants, and where the millwright, while employed in making alterations in a mill, above where the sawyer was at work, left a heavy chisel on a machine, where it was jarred by the vibration of the machinery, causing it to fall and injure the sawyer, the latter could recover from the common employer for the injuries sustained. Appellant cites the leading case of *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, where that court enters into a lengthy review of the doctrine of fellow servants, and overrules the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. This court has previously avowed its determination to abide by the principles announced in the decision of the *Ross Case*, and has refused to follow the doctrines announced in the later case just above cited. But in the *Conroy Case* it is said: "There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged." And this is another principle upon which this judgment must be sustained. It was the positive duty of

Mullin v. Northern Pac. Ry. Co

the master to furnish the respondent with a safe place in which to work. There is no question of superior servant, which is discussed so elaborately and so thoroughly by counsel for appellant. Neither is there any question of a foreman in charge or control, which has been the subject of so much discussion by the courts and text-writers, and which was the question discussed in the instructions in *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 46 Pac. 334, cited by the appellant, for here there is no contention that the respondent was working under the instruction or direction of Thompson or any one else. He was doing his work by himself, and the manner of doing the work is not in any way brought in question. Nor is there involved in this case any question of the carelessness of a fellow servant, as there would have been if Thompson, while assisting the respondent in the work in which he was engaged, had negligently hurt him. Nor does it seem to us that the doctrine of fellow servant is involved at all. It was the duty of the appellant to furnish the respondent with a reasonably safe place in which to rake the cinders from the box, and to maintain the safety of that place. It is conceded that it was rendered unsafe by the action of one who was not in any manner connected with the work which respondent was doing, but who was sent there by the company to perform an independent service, and who, in the exercise of that delegated authority, changed the place where respondent was working from a safe to an unsafe one. Even in *McDonough v. Great Northern Ry. Co.*, supra, this court said: "We think that, in reason, and upon the authority of the better considered cases, it must be held that it is a positive duty which the master owes to an employee not only to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe, but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence; and, where the performance of this positive duty is by the master intrusted to another, his failure to perform is the failure of the master." The positive duty to maintain the safe place in this instance must have been intrusted to some one, or else there would have been negligence on the part of the master, and, having been intrusted to another, the failure of that other to perform, as was said in the quotation just above, was the failure of the master, and the responsibility could not be avoided.

An examination of the record satisfies us that no error was committed in the admission or rejection of testimony, or in the giving or refusing instructions.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON and HADLEY, JJ., concur.

DEAN *v.* OREGON R. & NAV. CO.

(Supreme Court of Washington, April 29, 1905.)

[80 Pac. Rep. 842.]

Appeal—Transcript—Time of Filing.—Where a transcript on appeal was not certified and filed within 90 days from the time of taking the appeal, but one of appellant's attorneys showed by affidavit that less than 30 days from the date of the appeal he wrote the clerk, directing him to certify the transcript, and that he supposed the clerk had done it, it not appearing that the delay beyond the 90 days occasioned any delay in the hearing of the appeal, or caused any expense or serious embarrassment to respondent, a motion to dismiss the appeal will be denied.

Action by Parents—Parties—Dismissal.—Where, in an action by a father and mother for the death of their minor son, defendant objected to the admission of any evidence on the ground that plaintiffs were not entitled to recover, and that the complaint did not state sufficient facts to constitute a cause of action, but the motion was overruled, it was not error for the court at the close of the case to grant leave to dismiss the mother as a plaintiff.

Injury to Employee—Structure Near Track—Sudden Starting of Train—Proximate Cause.*—Where the space between the side of a car standing on a trestle and the edge of the trestle was only about nine inches, and a servant employed about the train was standing on the trestle beside the car when the train started, precipitating him to the ground and killing him, the proximate cause of the injury was not the narrowness of the trestle, but the unexpected starting of the train.

Same—Same—Management of Train—Duty of Master.—Where one employed on a railroad construction train was ordered to take a position beside a car on a trestle, there being a space of only about nine inches between the side of the car and the edge of the trestle, it was incumbent on the master to keep the train still until the servant had left such dangerous position.

Same—Same—Fall Caused by Sudden Starting of Train—Whether Master Chargeable with Notice of Peril.†—Where a servant employed on a railroad construction train was engaged in his duties, standing beside a car on a trestle, when he was killed by being precipitated to the ground, owing to the moving of the train, an instruction that, even if plaintiff was negligent in going on the track, the master would be liable if its agents and servants knew or might have known that deceased was on the trestle, was erroneous as omitting the qualification that the master would not be liable unless the agents knew, or

*As to what is, and is not, the proximate cause of an injury, see foot-notes appended to *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, B. & N. O. R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

†As to the degree of care required of a railroad company, as an employer, to furnish a safe place to work, see *Galow v. Chicago, etc., Ry. Co.* (C. C. A.), 12 R. R. R. 678, 35 Am. & Eng. R. Cas., N. S., 678; foot-note appended to *Northern Alabama Ry. Co. v. Mansell* (Ala.), 11 R. R. R. 186, 34 Am. & Eng. R. Cas., N. S., 186; *Scott v. Seaboard Air Line Ry. Co.* (S. Car.), 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148.

As to the degree of care required of a railroad company, as an employer, see foot-notes appended to *Weed v. Chicago, etc., Ry. Co.*

Dean v. Oregon R. & Nav. Co

might and should have known, by the exercise of ordinary care.

Action by Parents—Right to Services of Son—Presumption.—Where, in an action by a father for the death of his 18 year old son, the evidence showed that deceased left his parents' home some years before his death, without their consent, and that he never sent any of his wages home, the facts did not authorize a presumption that deceased would have returned home, or have turned his wages, or a portion thereof, over to his parents.

Same—Same—Evidence.—In an action by a father for the death of a minor son, who had left home some years before his death, evidence was admissible that deceased would have been able to earn substantial wages, and had manifested an intention to give, and, as a matter of reasonable certainty, would have given, the same, or some material portion thereof, to his parents.

Crow, J., dissenting.

Appeal from Superior Court, Spokane County; Wm. E. Richardson, Judge.

Action by H. P. Dean against the Oregon Railroad & Navigation Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

W. W. Cotton, Thos. O'Day, and L. S. Wilson, for appellant.
Barnes & Latimer and Alfred M. Craven, for respondent.

Root, J. Respondent and wife brought this action against the appellant to recover damages occasioned by the death of their minor son, who was killed while working for appellant on and about a train filling in a trestle with dirt and gravel hauled by cars constructed for that purpose, and unloaded from said cars while standing upon said trestle. From a judgment in favor of respondent, appellant appeals.

Respondent moves to dismiss the appeal in this case for the reason that the transcript was not certified and filed within 90 days from the time of taking the appeal. One of the appellant's attorneys shows by affidavit that on August 8, 1904, which was less than 30 days from the date the appeal was taken, he dictated a letter to the clerk of the court directing him to prepare, certify, and file a transcript of the record in this case, and that he supposed that the clerk had complied with said request, and relied thereupon, and did not learn anything to the contrary until he received respondent's brief. The clerk, by affidavit, says that

(Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797; *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564; *Hinzeman v. Missouri Pac. Ry. Co.* (Mo.), 13 R. R. R. 178, 36 Am. & Eng. R. Cas., N. S., 178; *Illinois Cent. R. Co. v. Prickett* (Ill.), 13 R. R. R. 139, 36 Am. & Eng. R. Cas., N. S., 139.

As to the combined effect of contributory negligence and negligence after the discovery of servant's peril, see *Louisville & N. R. Co. v. Lowe* (Ky.), 11 R. R. R. 434, 34 Am. & Eng. R. Cas., N. S., 434; *Carter v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas., N. S., 324; *Harrington v. Los Angeles Ry. Co.* (Cal.), 9 R. R. R. 191, 32 Am. & Eng. R. Cas., N. S., 191; foot-note appended to *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643; foot-notes appended to *Memphis St. Ry. Co. v. Haynes* (Tenn.), 13 R. R. R. 384, 36 Am. & Eng. R. Cas., N. S., 384.

Dean v. Oregon R. & Nav. Co

he never received such a letter. It does not appear that the delay beyond the 90 days occasioned any delay in the hearing of this appeal, or caused any expense to respondent, or any serious embarrassment. While we do not think that appellant's counsel is free from criticism for not giving the matter more careful attention, yet we do not feel that the oversight of an attorney, who, from the very nature of his business, must be employed and concerned with many different matters, should constitute the basis for punishing his client to the extent of depriving him of the right of appeal, except in those cases where the statute or the established practice of the court makes such action imperative. In this case the court would have imposed terms upon appellant had it been shown that respondent suffered any expense or loss by reason of appellant's neglect and the delay thereby occasioned. The motion to dismiss is denied.

This action was commenced by the parents jointly. Before any evidence was taken, appellant objected to any evidence being admitted, for the reason that plaintiffs were not entitled to recover, and that the complaint did not state facts sufficient to constitute a cause of action. At the close of the case leave was granted by the court to dismiss the wife from the case as a party plaintiff. Appellant contends that this was unauthorized. It is contended that husband and wife cannot maintain this kind of an action jointly, and that, an objection to the introduction of evidence having been made at the commencement of the trial, it was too late to permit the wife to be dismissed as a party after the evidence was put in, and that it was error to permit the husband to continue the action. Without deciding whether or not husband and wife may jointly maintain an action of this kind, we do not think the trial court committed error in dismissing the wife and permitting the husband to continue the action. It is not perceived that this action of the court in any manner prejudiced the rights of appellant. The spirit of our Code permits and requires great liberality in all matters of pleading and practice, to the end that substantial justice may be attained. We think the action of the trial court in this particular was justifiable.

The train in connection with which the deceased was working consisted of dump cars which were unloaded by a plow. This plow was drawn through the train by means of a cable and engine attached to what is known as a "Ledgerwood car." It was the duty of the deceased to unfasten the doors and to pass through the cars cleaning out the remaining gravel after the plow had passed through the train, so that the doors could be closed and fastened before the cars were reloaded. These cars are 10 feet 6 inches in width, and the sides of the cars are composed of swinging doors, so that when they are unfastened they swing out at the bottom, and let the gravel out at the sides. The ties forming the floor or top of the trestle were 12 feet long, so that the space between the side of the car and the edge of the trestle would be only about 9 inches, more or less. The doors of

Dean v. Oregon R. & Nav. Co

these cars were unfastened by a lever, and when the cars were empty a man standing on the ground could close the doors, they being fastened by a latch at the top of the side of the car. Appellant claims that it was customary to leave these doors open until the train should pull off from the trestle, and that the men would then get down on the ground and close them. Some of respondent's witnesses testified that deceased was instructed by the foreman to get down on the trestle and close these doors immediately after the gravel was discharged, and while the train was still upon the trestle. It was while the train was on the trestle that deceased climbed down for the purpose, as respondent contends, of closing these doors pursuant to instructions. The train, without any warning, started from the trestle, and precipitated deceased therefrom to the ground, some 40 feet below, causing injuries from which he soon died. It is contended by appellant that the narrowness of the trestle made the closing of these doors thereupon a very dangerous work, and that this danger was open and apparent to the deceased, and that he could not himself recover damages if alive. It is, of course, true that a servant assumes the dangers of his working place that are open and apparent; but we do not think that principle controlling here. The proximate cause of death was not the narrowness of the trestle, or the limited space in which decedent had to work, but it was the unexpected starting up of the train. If, as testified by respondent's witnesses, it was the duty of decedent, in carrying out the orders of the foreman, to get down on the trestle and close these doors while the train stood upon the trestle, it was a service fraught with danger which both the servant and the master should have taken notice of, and they should have regulated their conduct accordingly. The foreman knew that this was dangerous work, and knew that the starting of the train would constitute an additional, distinct, and pronounced element of danger. It was incumbent upon the master, having ordered the servant into this dangerous place, to keep the train still until the work of closing the doors was finished and the servant had returned to a place of safety. There was a flat contradiction in the evidence as to whether or not the foreman gave instruction to close the doors while the train was upon the trestle, and as to whether or not it was necessary to get down on said trestle to close said doors. This evidence being conflicting, it was a question for the jury to pass upon; and, there being sufficient competent and material evidence to sustain respondent's contention in this behalf, the conclusion of the jury cannot be disturbed by this court.

Among other instructions, the trial court gave the following: "The rule of law upon that subject is that, even though the plaintiff was guilty of negligence in getting down upon the track to close the doors, in violation of the orders of the defendant, its agents and servants, at that particular time in question, although it had been previously the custom to close said doors upon the

Dean v. Oregon R. & Nav. Co

trestle before said cars were removed therefrom, yet if you find from the evidence that while the plaintiff was engaged in that labor of closing the doors upon the sides of said car, and that the defendant, its agents and servants, had knowledge, or might have known, that he was closing said doors, or was upon the trestle, then and in that event the defendant would have no right to move said train until said Edgar Dean had completed the work and placed himself out of danger in the movement of said train; and if the railroad company could, by the exercise of ordinary care, have prevented the injury and death of said Edgar Dean, then in that event your verdict should be for the plaintiff, even though you should find that the deceased was guilty of negligence in going upon said trestle to close said doors at said particular place." This instruction is erroneous in saying that the appellant would be liable even though the plaintiff was negligent in getting down upon the track, in violation of orders, to close the doors, if the appellant or "its agents and servants had knowledge or might have known that he was closing said doors, or was upon the trestle." If decedent had been guilty of negligence in violating orders and in climbing down upon the trestle to shut these doors, still the appellant would be liable if its foreman in charge knew that decedent was in that dangerous place, and likely to be greatly injured or killed when he caused the train to be started up. But the unqualified expression "or might have known" is too broad. If appellant's foreman, in charge of said train, knew, when starting the same, that decedent was in this dangerous place, and liable to be thrown from the trestle by the starting of the train, or might and should have so known by the exercise of ordinary care, then the master was guilty of actionable negligence in starting said train without warning. It is unnecessary to decide whether or not this erroneous instruction, in view of all the instructions in the case, would be deemed prejudicial error if there were no other occasion for reversing this case.

It is contended strenuously by appellant that respondent has shown no damages entitling him to any recovery. The evidence shows that the decedent left the home of his parents some years ago without their consent, and some time thereafter enlisted in the army, being dishonorably discharged therefrom a short time prior to his death. The evidence of respondent and wife shows that after decedent left he never sent them any of his wages, or contributed to their support or assistance in any manner whatsoever. Appellant claims that these facts establish a manumission. Respondent argues that he had a right to assert his parental authority over said minor at any time or place when or where he might find him prior to his reaching his majority, and that he would have power to collect his wages, and that it must be presumed that the minor would return home or turn over his wages, or a portion thereof, to his parents. We do not think, under the facts of this case, that this presumption can be indulged. The

Dean v. Oregon R. & Nav. Co

boy was just about 18 years old when he was killed. Under recognized mortuary tables his expectancy would be greater than five years. Therefore it could be presumed that he would live until he was 21 years of age. But it appearing that he had abandoned the home of his parents, and had sent them absolutely nothing since said abandonment, we do not think it a fair presumption to be indulged that his conduct for the few years preceding his death would all be changed, and that he would soon be found returning home, or contributing his wages to the parents. This was a matter requiring proof. As the record stands now, we can find no evidence to sustain a verdict of damages. Ordinarily, this would require a reversal, with instructions to dismiss the action; but in this case there are certain things appearing in the record which we think would make such disposition unjust. It appears that certain letters received by the parents from their son prior to his death were offered in evidence by respondent for the purpose of showing an intention on his part to do something for his parents, and an offer of proof of some "agreement" looking to this end was also tendered. These letters and this agreement were excluded by the trial court. Neither the letters nor the agreement is brought up in the record, and consequently we cannot say whether they were competent evidence or sufficient evidence to show that this boy contemplated a change in his conduct, and that it was his purpose and disposition to return, or contribute of his wages to the parents. If it could be shown that since leaving home the boy had, some time prior to the accident, adopted a line of conduct indicating ability to earn wages, and had manifested an intention and disposition to contribute those wages to his parents, and this evidence should be weighty enough to show that there was a reasonable likelihood of his thus becoming a means of financial support and assistance to them, we think they would be entitled to recover such an amount as, under the facts, it would be reasonable to believe they had been deprived of by his death. We think the respondent should be permitted to prove, if he can, by evidence competent for that purpose, that decedent would have been able to have earned substantial wages, and had manifested an intention to give, and, as a matter of reasonable certainty, would have given, the same, or a material portion thereof, to his parents, and that all of the facts surrounding him and bearing upon the question of his career during the rest of his minority were such as to reasonably justify the belief, on the part of a person of ordinary intelligence, that said parents would have received a substantial pecuniary benefit from him had he not been killed.

The judgment of the honorable superior court is reversed, and the cause remanded for a new trial.

MOUNT, C. J., and RUDKIN and DUNBAR, JJ., concur.

ST. LOUIS & S. F. R. CO. *v.* MCFALL.

(Supreme Court of Arkansas, April 8, 1905.)

[86 S. W. Rep. 824.]

Master and Servant—Death of Servant—Railroads—Imputed Negligence.*—Where a conductor of a freight train was killed in a collision, by the negligence of his engineer, at a point, where he was unable to control the engineer's actions by any signal that he could have given or act he could have done that was not done by the engineer, the negligence of the engineer was not imputable to him.

Appeal from Circuit Court, Craighead County, Jonesboro District; Felix G. Taylor, Judge.

Action by Anna McFall, administratrix of W. O. McFall, deceased, against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

"On the 16th day of February, 1902, and for some time prior thereto, W. O. McFall was employed" by the St. Louis & San Francisco Railroad Company as a conductor, and on that day had charge of fast freight train 25,201, with William Adams as his engineer, and was running from Thayer, Mo., to Memphis, Tenn. This train left Thayer, Mo., between 4 and 5 a. m., as second section of 201, with orders to run 45 minutes behind first 201, which was a regular passenger train. At Hardy, the first water station, some 18 miles east of Thayer, McFall's train stopped, and then received orders to meet freight train 252, in charge of Conductor Shirk and Engineer Morehead, at Ravenden Station, about 15 miles further east. McFall's train was a first-class train, and was entitled to the main line at the meeting point, while Shirk's train was a third-class train, and was required to take the siding at this meeting point.

Shirk's train arrived at Ravenden, the meeting point, from 5 to 10 minutes ahead of McFall's train, and, instead of taking the siding, stopped on the main line, at the switch for this siding. The engineer cut the engine off, and ran it up to the water tank on the main line, took water, and returned to his train. McFall's train approached from the west, without stopping at the station, and ran into Shirk's train. No one was hurt on either train, except Conductor McFall, who at the time of the collision was looking out at the side door of his caboose. The sudden stopping of the train caused the side door, which was a sliding door, to close, striking McFall about the head or neck, killing him.

It also appears that neither train had any rights over the other

*For the authorities in this series on the subject of imputed negligence, see *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Evensen v. Lexington & B. St. Ry. Co.* (Mass.), 14 R. R. R. 159, 37 Am. & Eng. R. Cas., N. S., 159.

St. Louis & S. F. R. Co. v. McFall

at the point of collision. McFall's train, as against Shirk's train, had the superior right to the main line up to the clearance post, a few feet west of the east switches at this station. Shirk's train had superior rights to the side tracks, and had the right to the main line east of the switch. The territory between the east switch stands and the clearance posts is called "neutral territory," and this is where Shirk's engine was when McFall's engine struck it.

Anna McFall, as administrator of W. O. McFall, deceased, brought this action against the railroad company to recover damages, caused by the death of her intestate, for the benefit of the widow and children of the deceased, alleging that she was his widow, and Leoho McFall, 14 years of age, Gladdis McFall, 13 years of age, and Nadine McFall, 8 years of age, were his children. She alleged in her complaint that McFall's death was caused by the negligence of his own engineer, Adams, in that the latter approached Ravenden Station, the meeting point, without reducing the speed of his train and without having his train under control; and by the negligence of Shirk and his engineer in not having their train on the siding on the arrival of McFall's train.

The defendant answered, and admitted that McFall's engineer, Adams, was negligent, and alleged that the combined negligence of Adams and the contributory negligence of McFall caused the collision and McFall's death.

There is no contention here that McFall and the engineer on his train and the employees on Shirk's train were fellow servants, and that he had assumed the risk of their negligence. It is virtually conceded that they were not. The only questions presented for our consideration on this appeal are: (1) Is the negligence of the engineer, Adams, to be imputed to McFall; and, (2) if not, was McFall guilty of negligence which contributed to his death?

The facts we have stated were proved in the trial of the issues in this case; also the following rules:

"(352) Engineers, when on the road, are under the direction of the train conductor, whose orders they will obey, unless his orders may endanger the safety of the train or require a violation of the rules, in which event the engineer becomes equally responsible with the conductor."

"(505) No train will leave a station without sufficient brakes, air or hand, to handle it with safety to the next stopping point."

"(508) Enginemen and conductors will both be held responsible for the test being made as provided in rule 502," which provides how the air brakes shall be tested.

Evidence was adduced tending to prove the following facts: When McFall's train was about to leave Thayer, Mo., as before stated, Adams, his engineer, undertook to test the air brakes, when McFall said to him, "Let's not wait for you to pump up the air; let's go on, and you can try the air down the road, the first

St. Louis & S. F. R. Co. v. McFall

time we have to stop," and they moved on without making the test of the air brakes. At Hardy, a station 18 miles from Thayer, they stopped to receive orders, and, in doing so, applied the air, and the air brakes worked well. They received orders to meet train No. 252, Shirk's train, at Ravenden, about 15 miles distant, and then ran on to that place. Adams, relating what then followed, says: "There was a slow bridge about $2\frac{1}{2}$ miles west of Ravenden, and I think we had an order there to reduce speed at that bridge; and in coming there it was awfully cold, and I had been using the engine pretty hard, and it was not steaming good, and I shut off way the other side of the bridge and let the train roll over the bridge and did not use the air, and after we rolled over the bridge I put the steam on again, and kept it on until we got to the mile board at Ravenden. I whistled for the road crossing there and for the mile board, and rolled on down, and then whistled for the meeting order, one long and one short blast, and we came on down, and there is a reverse curve there, and when I got in the curve I looked over about the tank and saw smoke and steam arising, and I said to my fireman, 'Those fellows are here, and we won't be delayed any,' and we rolled on down, and about 50 yards north of the pump house I applied the air, and I felt the train budge like it was working all right, and I rolled on down there expecting 252 to be on the side track, and when we got down a little farther I looked on the passing track and did not see anything of them. Well, I was pulling Mr. McFall, and Shirk's train was No. 252, and I expected to see Shirk's train on the siding, but I did not see them, and I thought probably they were doubling over another track, and by that time I was getting up near the tank, and I watched for them and did not see them, and I put the air on, and then looked at the order board and saw it was all right, and just as I passed the order board I came around the depot and struck straight track, and I saw their engine right ahead of me, and it looked to me like they were about 150 yards ahead of me, or not so far, and that scared me, and I put on the air and reversed the engine, and that did not seem to do any good at all, and we run on down and struck them."

He further testified that his train was running about 25 miles an hour as it passed the mile board, "and had been for a mile back," and about 8 or 10 miles an hour when it struck Shirk's train, and thinks that he could have stopped his train and avoided the collision if the air which set the brakes had "worked all right." It "worked all right" at Hardy, and until he "got in sight" of Shirk's train, and then failed, and the collision followed.

As his train approached Ravenden, McFall was in the caboose with no end doors or platform and no cupola, and had side doors on rollers. Adams testified: "McFall being in the caboose, there was nothing he could have done in the way of signaling me after it became apparent that something was wrong. I could not have seen him from the mile board. The track is all curves,

St. Louis & S. F. R. Co. v. McFall

first one way, then the other. In the curve at Ravenden, with the short train we had, I do not think McFall could have seen the engine, because the water tank and depot were in the way." He could have set the brakes by turning the air cock, for the purpose of checking the train, but that he was doing, and could do more effectually than McFall could have done.

At the time of the collision McFall was looking out of the side door of his caboose, when the sudden stopping of the train, caused by the collision, caused the door to close with great force and kill him, striking him on the head.

The jury returned a verdict in favor of the plaintiff for \$6,000. Judgment was rendered in her favor for that amount, and the defendant appealed.

L. F. Parker and *W. J. Orr*, for appellant.

J. F. Gautney and *N. F. Lamb*, for appellee.

BATTLE, J. (after stating the facts). Assuming that the collision was caused by the negligence of Adams, the engineer, was such imputable to McFall? In *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, Mr. Justice Field, delivering the opinion of the court, said: "That one cannot recover damages for an injury to the commission of which he has directly contributed, is a rule of established law and a principle of common justice. And it matters not whether contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it." In that case the court held: "A person who hires a public hack and gives the driver directions as to the places to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver." The court, after a review of many cases upon the subject, said: "Those on a hack do not become responsible for the negligence of the driver, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned; and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it."

St. Louis & S. F. R. Co. v. McFall

In *New York, Lake Erie & Western Railroad Company v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126, a leading case, in which there is a long review of authorities, the following rule is laid down: "A passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked—whether as a cause of action for an injury done by the driver, or as contributory negligence to bar an action by the passenger against a third person for an injury sustained—the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring."

Mr. Beach, in his work on Contributory Negligence, says: "The general rule is that, when the plaintiff's own want of ordinary care is a proximate cause of the injury he sustains, he cannot recover damages from another therefor. But, under certain exceptional conditions, * * * a plaintiff may be legally chargeable with the negligence of some third person, which is imputed to him as though it were his own. In this particular the law of negligence is analogous to the general principles of the law as to liability, under which one is primarily responsible for his own acts, and only secondarily for the acts of others, as, e. g., those of his servant or agent. The rule upon this branch of our subject is that the contributory negligence of third persons constitutes a valid defense to the plaintiff's action only when that negligence is legally imputable to the plaintiff. There must, in order to create this imputability, be some connection, which the law recognizes, between the plaintiff and the third person, from which the legal responsibility may arise. The negligence of the third person and its legal imputability must concur. It is clear that there is no justification for the negligent misconduct of the defendant in that some third person, a stranger, was also in the wrong. When the defendant pleads the negligence of a party other than the plaintiff in bar of the action, it must appear, not only that such third person was in fault, but that the plaintiff ought to be charged with that fault." Page 142, § 100.

It follows, then, that, in cases where the injured and negligent do not sustain to each other the relations of master and servant, or principal and agent, or other relation by which alone one is responsible for the act of the other, the contributory negligence of a third person will not be imputed to the party thereby affected, unless he was at the time subject to the control of the injured person, and the wrong—the negligence—was committed at a time when it was within the power of such person to prevent it, and it was his duty to do so, and under circumstances which indicated that he assented to or acquiesced in the wrong by his

Santa Fe Pac. R. Co. v. Holmes

failure to interfere, or directed it to be done; and that, when the conditions are reversed, the reverse is true—it will be imputed.

The engineer of a railroad train is presumed to have been selected on account of his fitness for the position he fills. Being qualified, it is not the duty of the conductor to keep him under his constant supervision. In the discharge of his duties the engineer must be left to a large extent to the exercise of his own judgment. There was no evidence in this case tending to prove that Engineer Adams was not, before the collision of his train at Ravenden, careful and competent for the discharge of his duties, or that McFall, his conductor, had reason to believe that he was not.

The jury, in returning a verdict in favor of the plaintiff, necessarily found that the negligence of Adams was not imputable to McFall, and that McFall was not guilty of contributory negligence. The evidence was sufficient to sustain their findings.

Judgment affirmed.

SANTA FE PAC. R. CO. v. HOLMES.

(Circuit Court of Appeals, Ninth Circuit, February 6, 1905.)

[136 Fed. Rep. 66.]

Master and Servant—Injuries to Servant—Railroads—Train Dispatchers—Negligence.—In an action for injuries to a railroad engineer in a collision between two trains approaching each other, evidence held to sustain a finding of negligence of the train dispatcher in failing for 10 or 12 minutes to issue orders to one of the trains with reference to the passing, after he became aware that one of them had passed a station 2 minutes ahead of the time on which it was running, in violation of the orders, the probable effect of which was the collision which occurred.

Same—Vice Principal.*—A train dispatcher is a vice principal, and not a fellow servant, of an engineer of a train running under his orders.

In Error to the Circuit Court of the United States for the Southern District of California.

The defendant in error brought an action to recover damages for personal injuries sustained while he was in the employment of the plaintiff in error as locomotive engineer in a head-on collision between a limited passenger train west bound, known as "Train No. 3," and a passenger train east bound, known as "Train No. 4," on which the defendant in error was on duty as an engineer. He claimed that the collision and his injuries were

*See foot-note appended to *McHugh v. Manhattan Ry. Co.* (N. Y.), 14 R. R. R. 284, 37 Am. & Eng. R. Cas., N. S., 284; foot-note appended to *Virginia & S. W. Ry. Co. v. Clowers' Adm'x* (Va.), 13 R. R. R. 170, 36 Am. & Eng. R. Cas., N. S., 170; *Northern Pac. Ry. Co. v. Dixon* (U. S.), 11 R. R. R. 368, 34 Am. & Eng. R. Cas., N. S., 368.

Santa Fe Pac. R. Co. v. Holmes

caused by the negligence of a train dispatcher of the plaintiff in error. The train dispatching office was at Needles, and its jurisdiction extended eastward from Needles to Seligman, Ariz., as well as over the division westward from Needles. The office was in charge of two chief dispatchers and six assistants, three of the latter being assigned to each division. Assistant dispatcher E. L. Moore was on duty and in charge of the work on the Arizona division, at and before the time of the collision. On November 20, 1901, at 4:22 o'clock in the morning, train No. 3, west bound, and about two hours late, was at Kingman, and train No. 4, east bound, and about twenty-two minutes late, was at Needles. Both trains were run on regular schedule or time cards when on time or but slightly delayed. On account of the unusual delay of train No. 3 on that morning, it became necessary to issue special orders for the operation of both trains over the Arizona division. At 4:12 a. m. Train Dispatcher Moore promulgated a special order No. 22 in words as follows: "No. 3 eng. 482 has right of track over No. 4 eng. 444 & 450 to Needles but will run 1 (one) hour & 50 mins. late Kingman to Needles." Copies of this order were sent to Kingman and Needles, and were delivered to train No. 4 before 4:22 a. m., and to train No. 3 upon her arrival at Kingman at 4:21 or 4:22. At 4:22 train No. 4 departed from Needles, and ran east to Mellen, a distance of 11.9 miles, arriving there some time between 4:42 and 4:45, and stopped there upon a signal that there were orders to be delivered to it. At 4:21, it being apparent that No. 3 was more delayed in arriving at Kingman than had been expected, Train Dispatcher Moore promulgated special order No. 23, as follows: "No. 3 eng. 482 will run two (2) hours late Kingman to Needles." Copies of this order were sent to Kingman and were delivered to No. 3 at the same time that order No. 22 was delivered to Train No. 4 on its arrival at Mellen. The effect of these orders, when taken with the general rules of the company, was that No. 3 was to be run in accordance with the time card, except that it was to run two hours behind the scheduled time, and was to have the right of track over the other train, and train No. 4 was to look out for No. 3, and run with reference to its movement, as provided for by the special orders in connection with the time-table. These orders and the time-table would have made Franconia the probable place of passing of the trains. The crew of No. 4 left Mellen with the intention of running to Franconia, and there going upon the siding. Train No. 3 left Kingman at 4:31, six minutes late, according to its schedule as provided by the special order No. 23 and the time card. Yucca, which was 23.9 miles west of Kingman and 12.8 miles east of Franconia, was the only night telegraph office between those two points. Train No. 3, according to the special order No. 23 and the time card, should have passed Yucca at 4:57. It passed there at 4:55, or two minutes ahead of its schedule time. At 4:58 or 4:59 the local telegraph operator at Yucca reported to

Santa Fe Pac. R. Co. v. Holmes

the train dispatcher Moore that No. 3 passed Yucca at 4:55. Train No. 4 left Mellen, which was the only night telegraph office between Needles and Franconia, between 4:45 and 4:47, and ran 6.8 miles to Powell, arriving there at 5 o'clock. A stop of three or four minutes was made there for the purpose of adjusting the flow of fuel oil in one of the locomotives, and the train then proceeded toward Franconia. In the meantime Train No. 3 arrived at Franconia six minutes ahead of the schedule time under the special order for leaving that station. The engineer, on approaching that station, whistled his signal to inquire if there were any orders there for his train, and received by semaphore signal from the operator the reply, "No orders from the train dispatcher." He went on his way without stopping at Franconia, and while going at a speed of from 60 to 70 miles an hour, at about $1\frac{1}{4}$ miles from Franconia, collided with train No. 4, which was running at a speed of from 40 to 50 miles an hour. Both trains were wrecked, a number of persons were killed, and several others, including the defendant in error, sustained serious injuries. The operator at Franconia had no orders that morning for either No. 3 or No. 4. The defendant in error, but for the collision, could have reached and placed train No. 4 on the siding at Franconia station two or three minutes before train No. 3 was due there. The plaintiff in error's rule No. 385 only requires the train not having the right of track to take a siding and be clear of the main track before the leaving time of the opposing train. The plaintiff in error answered the complaint, denying that it was negligent, and alleging that the injuries received by the defendant in error were the result of his own negligence and carelessness and that of his fellow servants and co-employees. The case, by the stipulation of the parties, was tried before the court without a jury, and the court found that the train dispatcher Moore was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and trains from colliding and in failing to give proper orders as to the movements of one of said engines and trains. Judgment was entered for the defendant in error in the sum of \$9,000, with costs.

T. J. Norton, E. E. Millikin, and J. Wade McDonald, for plaintiff in error.

Waters & Wylie, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is the contention of the plaintiff in error that the orders given by the train dispatcher, together with the regular time schedules and the rules and regulations of the company, known and understood by the crews of both trains, were sufficient, if observed, to have insured the safety of all concerned, and that the accident was the result of the failure of train No. 3 to ob-

Santa Fe Pac. R. Co. v. Holmes

serve said time schedule and rules and regulations in connection with the special orders, in that it passed Yucca two minutes ahead of time, and Franconia six minutes ahead of time; that there was no evidence to go to the jury tending to show negligence on the part of the plaintiff in error; and that its motion for nonsuit should have been granted by the court. It is argued that, although the train dispatcher was advised that train No. 3 had passed Yucca two minutes ahead of its passing time for that station, the circumstances did not make it his duty to send additional orders to that train, he having previously promulgated orders sufficient to have insured the safe operation of both trains had such orders been obeyed, and that, having once given proper and sufficient orders in the premises, the duty of the master to the employee had been fulfilled; and, further, that the violation of the orders by the conductor and engineer of train No. 3 was an act, not of the plaintiff in error, but of the fellow servants of the defendant in error, for which the former is not liable. It is assigned as error that the trial court erred in holding that it was the imperative duty of the railroad company to have attempted to enforce obedience to order No. 23 by ordering train No. 3 to stop at Franconia. The finding of fact of the trial court must stand as the verdict of a jury if there was any evidence whatever to sustain them. We cannot say, on examining the evidence in the bill of exceptions, that there was no evidence of negligence on the part of the plaintiff in error. The trial court found that "train No. 3, which should have passed Yucca at 4:57, did so at 4:55, and that Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia," and was of the opinion that in failing to so act he was negligent. Under the circumstances it would seem that ordinary prudence required of the train dispatcher that he fix a point of meeting of the trains; but, whatever may have been his duty in that regard, we think there was evidence of his negligence in the fact that, after he was advised that train No. 3 passed Yucca two minutes ahead of its time, and was running in violation of his orders, he failed to send orders to have that train stopped at Franconia. He had 12 or 13 minutes within which to make that order. He knew that No. 3 was running in advance of its schedule time, whether because of willful violation of the rules and orders or because on the downgrade track by these stations it had become uncontrollable, or because the engineer's watch was running slow; and he must have known that, if such violation of orders continued, there would probably be a collision. The engineer of train No. 3 testified that according to his watch he left both Yucca and Franconia on schedule time, and according to the orders. It may be that the error of the train dispatcher in not sending special orders to Franconia was induced by his own negligent entries on his train sheet, a record which he kept of the progress by hour and minute of both of the trains. On that train sheet it appears that he had marked "5:45" and "5:47"

Santa Fe Pac R. Co. v. Holmes

as the time of the arrival and departure of train No. 4 at Mellen, instead of the figures "4:45" and "4:47," which were the actual times at which that train arrived and left that station. The circumstances called for the exercise of the greatest care and diligence on the part of the plaintiff in error. It could not absolve itself from its duty by giving orders which, if strictly complied with, would have insured the safety of its employees. The duty was a continuing one, and called for the issuance of further orders as soon as it became apparent that a known failure to comply with orders already made was likely to or might result in disaster.

There was no error in holding the plaintiff in error accountable for the negligence of the train dispatcher. *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; *Oregon Short Line v. Frost*, 74 Fed. 965, 21 C. C. A. 186. In *Northern Pacific Ry. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592, this court approved the instruction given by the trial court to the jury in such a case as follows:

"It is the duty of the defendant company to all operatives upon its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction, and to give such orders as will insure the safe passage of the one by the other. With regard to the movement of trains, the train dispatcher stands in the place of the defendant."

The plaintiff in error challenges the jurisdiction of the Circuit Court, and contends that the allegation of the complaint as to the organization and existence of the plaintiff in error is not sufficient to show that it was a corporation of the United States. That allegation is as follows:

"That the defendant is now, and at all times mentioned herein was, a corporation organized and existing under the laws of the United States, having its principal place of business at and being a resident of Los Angeles, in the state of California."

It is said that, in order to show jurisdiction in the Circuit Court, the complaint should have contained the allegation that the plaintiff in error was created by and existed under a law of the United States, and that it derives all its corporate powers and authority from such law, and that in the maintenance and operation of the railroad in question it was exercising or claiming to exercise such powers and authority. We think that all this is necessarily implied in the undenied allegation of the complaint. If the plaintiff in error was organized and existed under the laws of the United States, it could not have been organized or had its existence under other authority. It must have been a corporation of the United States, and as such entitled to maintain the action in the Circuit Court. *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319.

The judgment of the Circuit Court is affirmed.

PARROTT v. CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Iowa, May 3, 1905.)

[103 N. W. Rep. 352.]

Who Are Employees—Independent Contractors.*—The test to be applied in determining whether an employee is or is not an independent contractor, for whose acts the employer is free from responsibility, is whether the employee represents his employer as to the result of the work only, in which case he is an independent contractor, or as to the means as well as the result, when he is merely an agent or servant.

Same—Same.—A contract with a railroad for the removal of earth from cuts required the contractor to furnish all work, tools, and equipment to do all the grading required for filling at a certain place under the direction and to the satisfaction of the chief engineer, who should also determine the width of the embankment to be constructed, and who was empowered to terminate the contract whenever he deemed it for the railroad's best interest. The railroad was to pay the contractor a certain price for each cubic yard of grading done, and the contractor obligated himself to take certain precautions, to pay damages to stock and other property occasioned by his negligence, and to save the railroad harmless from liens. Held, that the contractor was not an independent contractor, but the servant of the railroad, for whose negligence in removing soil from private property the railroad was liable.

Same—Same—Injury to Land—Removal of Soil.—In an action for damages to realty, it is not reversible error to permit witnesses to give the difference between the values of the land before and after the injury, without first stating such values.

Injury to Land—Damages—Evidence.—In an action against a railroad for damages caused by the removal of soil from plaintiff's land, where the land from which the soil was taken was rendered practically valueless, and the title remained in plaintiff, the measure of

*See foot-note appended to *Omaha Bridge & Terminal Co. v. Hargadine* (Neb.), 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827.

As to who are, and are not, the employees of a railroad company, see *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10 (sleeping car porter is); *Ederle v. Vicksburg, etc., R. Co.* (La.), 11 R. R. R. 547, 34 Am. & Eng. R. Cas., N. S., 547 (where switching at intersection for both companies is done by employees of either of them, there is no privity of relation between such employees and the employers of the other company); *Huntzicker v. Illinois Cent. R. Co.* (C. C. A.), 11 R. R. R. 555, 34 Am. & Eng. R. Cas., N. S., 555 (person holding trainmaster's permit to ride on freight trains to acquire familiarity with duties of a flagman was an employee); *Chaney v. Louisiana & M. R. R. Co.* (Mo.), 8 R. R. R. 333, 31 Am. & Eng. R. Cas., N. S., 333 (volunteer riding free and assisting in handling baggage was not an employee); *St. Louis S. W. Ry. Co. v. Smith* (Ark.), 8 R. R. R. 1, 31 Am. & Eng. R. Cas., N. S., 1 (where railroad has a separate corporate existence in different states); *Gulf, C. & S. F. Ry. Co. v. Shelton* (Tex.), 8 R. R. R. 634, 31 Am. & Eng. R. Cas., N. S., 634 (where switching crew worked for two companies); *Davis v. Atlanta & C. A. L. Ry. Co.* (S. Car.), 3 R. R. R. 317, 26 Am. & Eng. R. Cas., N. S., 317 (whether railroad fireman, at time he was injured at a public crossing, was in active employ of company, or member of the public, was a question for jury); *Missouri, K. & T. Ry. Co. of Texas v. Reasor* (Tex.), 3 R. R. R. 281, 26 Am. & Eng. R. Cas., N. S., 281 (person acting as express messenger and also, with the consent of the railroad, as its baggage-

Parrott v. Chicago Great Western Ry. Co

damages was the difference in the value of plaintiff's land before and after the injury, and not the mere value of the soil actually taken.

Same—Measure of Damages.—In an action against a railroad for damages caused by the removal of soil from plaintiff's land, it was not error to refuse a charge that all injuries resulting from the operation of the railroad had been adjusted in the sale of the right of way, where it was conceded that the railroad owned the right of way, and no witness based his estimate of damages on the operation of the railroad, and the charge of the court necessarily excluded any allowance for such damage.

Same—Damages.—Where a railroad removed soil belonging to plaintiff from both sides of its right of way through a considerable portion of plaintiff's farm, plaintiff's damages, as determined by the diminution in value of his farm, should be estimated on the basis of his entire farm, considered as a unit, instead of merely on the basis of narrow strips of land along the track.

Instructions.—A charge instructing the jury under what circumstances to find for plaintiff is, if erroneous, not prejudicial, where the undisputed facts are such as to entitle plaintiff to a verdict.

Injury to Land—Excessive Verdict.—In an action against a railroad for the removal of soil from the sides of defendant's right of way, running through plaintiff's land, the evidence showed that the effect of the excavations made by defendant, widening the cuts previously made, was to actually appropriate the soil from less than an acre of plaintiff's ground, leaving the sides nearly perpendicular. Further evidence as to the recession of the upper edge of the cut showed that the land which would be rendered unfit for farming purposes would not exceed two acres in all. One of defendant's witnesses testified, without any inquiry being made as to the grounds of his opinion, that the farm, as a whole (160 acres), was damaged in the sum of \$1 per acre. The land was worth not to exceed \$75 per acre. Held, that a verdict for \$450 would be cut down to \$300.

Appeal from District Court, Marshall County; O. Caswell, Judge.

Action for damages occasioned by the removal of earth be-

man); notes, 11 Am. & Eng. R. Cas., N. S., 447, 453 (hands employed by conductors in emergencies); note, 17 Am. & Eng. R. Cas., N. S., 442 (volunteers); foot-note appended to *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 14 R. R. R. 227, 37 Am. & Eng. R. Cas., N. S., 227 (express messengers); note, 11 Am. & Eng. R. Cas., N. S., 184 (employees of sleeping car companies); note, 22 Am. & Eng. R. Cas., N. S., 455 (whether employees of one railroad are fellow servants of employees of another company); *Peplinski v. Pennsylvania R. Co.* (Pa.), 4 R. R. R. 526, 27 Am. & Eng. R. Cas., N. S., 526 (employee of coal company, while assisting in unloading cars, not fellow servant of trainmen); *Hallett v. New York Cent., etc., R. Co.* (N. Y.), 22 Am. & Eng. R. Cas., N. S., 446 (whether employees of different companies were fellow servants); *Goodrich v. Kansas City, etc., Ry. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 137 (where traffic arrangement between companies); *Murray v. Lehigh Valley R. Co.* (Conn.), 4 Am. & Eng. R. Cas., N. S., 210 (railroad's use of track of another company made the employees of the latter its agents); *Wagen v. Minneapolis & St. L. R. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 438 (acceptance of volunteer's services); *Mickelson v. New East Tintic Ry. Co.* (Utah), 20 Am. & Eng. R. Cas., N. S., 855 (whether person requested by engineer to assist in management of train was a mere volunteer or an employee); *Stacker v. Louisville & N. R. Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 704 (boy requested by employee to assist in revolving turntable); *Cleveland, T. & V. R. Co. v. Marsh* (Ohio), 20 Am. & Eng. R. Cas., N. S., 54 (person invited by servant to assist him).

Parrott v. Chicago Great Western Ry. Co

yond the line of defendant's right of way. Trial resulted in a judgment against defendant, from which it appeals. Affirmed on condition.

J. L. Carney, for appellant.

LADD, J. The defendant's track and right of way extends through the plaintiff's 160 acres of land diagonally. In 1902 the company contracted with one Stoddart to remove the earth from certain cuts, including that in the portion of the right of way mentioned, and fill the approaches of a bridge near Melbourne. The complaint is that in doing so the earth was taken on each side of the track beyond the line between plaintiff's land and the right of way, "to a distance of 10 feet, * * * to a depth of * * * averaging 12 feet, * * * about a distance of 225 rods." leaving the adjacent land without support and worthless for about 10 feet farther; that at places the sides of the cut were left perpendicular to a depth of 25 feet, and that the land will be likely to crumble and fall off 37½ feet back; and that defendant has placed the right of way fence entirely on the plaintiff's land. The witnesses agree in saying that dirt was taken from beyond the right of way line, but differ as to the amount and area from which removed.

The work was done by Stoddart under the contract, and it is contended that this constituted him an independent contractor. In that event he cannot be said to have been the agent of the defendant, and it would not be responsible for the injury. An independent contractor is one who undertakes to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776. The test to be applied is whether the employee represents his employer as to the result of the work or as to the means. If the former, he is to be regarded as an independent contractor, but, if the latter, merely an agent or servant. *Overhouser v. Am. Cereal Co.*, 118 Iowa, 417, 92 N. W. 74. With this rule in mind, let us examine the contract. By its terms, "the contractor agrees to do and furnish all work, tools, supplies, machinery and equipment of every kind necessary to do all the grading required for filling Melbourne bridge at Melbourne, Iowa, except one hundred (100) feet on each side of the center line of the Chicago, Milwaukee & St. Paul Railway Company's crossing. The material for this filling shall be taken out of a cut south of Melbourne and between stations 700 and 740, or any other cut designated by the chief engineer of the company's railroad. Such grading shall be done under the direction and to the satisfaction of the chief engineer of the company and his assistant, and the embankment shall be of such width as they shall direct." The company was "to pay the contractor nineteen and one-half (19½) cents for each cubic yard of grading done, regardless of the length of haul, the same to be measured once only by cross-section in excava-

Parrott v. Chicago Great Western Ry. Co

tion." All estimates were to be made by the company's chief engineer and assistant, and payments to be made accordingly. The contractor obligated himself to maintain crossings and fences and keep stock off right of way, and to pay damages to stock or other property or to persons occasioned by his negligence, and also to save the company harmless from all liens; and it was further agreed that "the contract may be terminated by said chief engineer whenever he shall deem it for the best interests of the company to so terminate it," in which event the contractor was to be paid for the work done at the rate named. No plans and specifications were attached to the contract, and nothing in it indicated the result to be attained, save that the earth was to be taken from the cuts and placed in the fill. To what elevation or line was the fill to be raised? To what depth or width were the excavations to be made along the right of way? The contract contains no answers to these inquiries, save in stipulating that the "grading shall be done under the direction and to the satisfaction of the chief engineer of the company and his assistant." The word "grading," as used, is not synonymous with "filling," for the contractor promised to furnish the work, tools, etc., to do "all the grading required for filling." The earth to be used is described as "material for filling," not grading, and the fill, when completed, is designated as an "embankment," not a grade. Manifestly the word was not employed in the technical sense of bringing the surface at the bridge to a line or grade, but in the broader sense of including the excavating and filling contemplated by the agreement of the parties. See *Ryan v. Dubuque*, 112 Iowa, 284. Otherwise the company must be held to have authorized the contractor to excavate from its right of way in any manner or to any extent he might choose—a thing inconsistent with its duty to the public, and inconceivable in the protection of its own interests. As he was to do the grading (that is, excavate and fill) under the direction of defendant's agents, the engineers, Stoddart was not an independent contractor, but the servant of the company, and it is liable for any damages occasioned by the removal of the soil from plaintiff's land.

2. Instead of requiring the witnesses to estimate the market values of the land immediately before and after the injury complained of, the court allowed them to give the difference between such values, without first stating the values. While this practice is not to be approved as strictly accurate, it does not, under former decisions, constitute reversible error. *Richardson v. Webster City*, 111 Iowa, 427, 82 N. W. 920; *Millard v. Webster City*, 113 Iowa, 220, 84 N. W. 1044. Appellant also insists that, in any event, the inquiry did not call for the proper measure of damages. Though the removal of the earth rendered the land from which taken practically valueless, the title continued unimpaired in the plaintiff. The injury was to the soil only, and was of a character which precluded all thought of restoration. In these circumstances, the rule obtains that, "when the injury

Parrott v. Chicago Great Western Ry. Co

is to the soil itself, the measure of damages is the difference in the value of the real estate before the injury and after it." *Rowe v. Ry.*, 102 Iowa, 286, 71 N. W. 409; *McMahon v. Dubuque*, 107 Iowa, 58, 77 N. W. 517, 70 Am. St. Rep. 143; *Bradley v. Ry.*, 111 Iowa, 562, 82 N. W. 996. In *Harrison v. Palo Alto County*, 104 Iowa, 383, 73 N. W. 872, relied on by appellant, the action was for the value of the sand and gravel taken, which had a market value, and not for trespass, and therefore the case is not in point. Ordinarily, in a case like this, the dirt removed has little or no value independent of the land from which taken; and to fix the measure of damages as the value of such dirt, as was done in *Mueller v. Ry.*, 31 Mo. 262, would deprive the owner of adequate compensation for the injury received. See, as supporting the view expressed, *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; *Karst v. Ry.*, 22 Minn. 118; 13 Cyc. 151.

3. Appellant requested the court to instruct the jury on the theory that land had been taken by defendant; also that the value of that actually taken, only, should be allowed him as damages; and that all the injuries resulting from the operation of the railroad had been adjusted in the sale of the right of way. These instructions were rightly refused. There was no appropriation of the land. The soil, merely, was taken, and the damages were such only as were occasioned by the removal of the soil. The action is in trespass, and not for damages caused by the appropriation of an easement in the exercise of eminent domain; and this is a sufficient answer to the criticism of the instructions for not including some of the features suitable in condemnation proceedings. As to the instruction requested, that damages resulting from operation of the railroad should not be considered, it is to be said that no claim therefor was made in the petition. It was conceded that the company owned the right of way. No witness pretended to take them into account in estimating the difference in values of the farm before and after the excavations. The measure of damages as given by the court necessarily excluded any allowance thereof, for the value immediately before the injury must have been of the farm with the railroad in operation through it, precisely as the estimate immediately afterwards. There was no room for a mistake of the kind the instruction requested was intended to guard against, and for this reason refusal to give it was not error.

6. After both sides had rested, defendant moved the court to strike out all the evidence relating to injury to the farm as a whole. The excavation extended along both sides of a considerable portion of the right of way, and, in estimating the damages, it was not necessary to do so with reference to narrow strips of land along the railroad track, instead of the entire farm. The universal rule, where diminution in value of real estate is the measure of damages, is to treat the body of land occupied, cultivated, or made use of as a unit, and compute the damage to

Parrott v. Chicago Great Western Ry. Co

it as a whole, rather than to some particular part or division of it. See *Lough v. Ry.*, 116 Iowa, 31, 89 N. W. 77. This did not preclude the fullest inquiry as to whether what was done would affect any land other than that on which the trespass was actually committed, and, if so, how far back and the extent and character of such injury, present and prospective. *Thompson v. Ry.*, 116 Iowa, 215, 89 N. W. 975. If it developed that only the land along the tract would be affected, there was no impairment to the remainder to be taken into consideration. If, on the contrary, the jury should agree with one of defendant's witnesses that the excavations did work an injury to the acreage from which no earth was taken, this should have been considered in determining the diminution in the value of the farm in its entirety.

5. Several paragraphs of the charge instructing the jury under what circumstances to find for the plaintiff, if conceded to be erroneous, were not prejudicial, as the undisputed facts were such as to entitle him to a verdict. The exceptions to rulings on the admissibility of evidence are without merit. The jury assessed the damages at \$450, and appellant contends that the allowance was excessive. Cuts existed before the excavations complained of had been made, and the effect of these was to widen such cuts by the actual appropriation of the dirt from less than an acre of ground, leaving the sides nearly perpendicular. Some of plaintiff's witnesses testified on the theory that more of the surface had been disturbed, but they did not pretend to know. The two who measured found the widest place between the banks 113½ feet, and the narrowest 100 1-3 feet, and estimated the average width 106 or 107 feet, and an average of 10 or 12 feet deep. The defendant's engineer found the widest place 115.7 feet, and the deepest 18½ feet. He computed the land actually taken at one-eleventh of an acre, and up to the fences as replaced at two-fifths of an acre. As the right of way was 100 feet wide, it is apparent that the strips of earth removed were very narrow. But the witnesses agree that enough is likely to fall or wash in from the sides, so that the upper edge of the cut will recede 1½ times as far as the cut is deep. Including this, however, there are no data in the record for estimating the surface rendered unfit for farming purposes, including space for the location of a fence, not to exceed two acres in all. There were no buildings on the land, and its value did not exceed \$75 per acre. The plaintiff's witnesses thought that the excavations injured the remainder of the farm, but their reasons for this were decidedly hazy. One suggested that gullies would wash out, but how this would be any more likely back of the line to which it was conceded the earth would finally crumble, than if such line had been that of the right of way, is not apparent, and was not explained. Another thought the continual crumbling would necessitate the repeated removal of the fence. This could be readily avoided by placing it beyond the line to which the crumb-

Struble v. Burlington, etc., Ry. Co

ling was likely to extend. But defendant adduced the testimony of one witness to the effect that the acreage was damaged in the sum of \$1 per acre, and no inquiry was made as to the grounds of his opinion. In view of this evidence, the verdict allowing something for supposed injury to the remainder of the farm should be sustained, but even then it ought not have exceeded \$300. If a remittitur of all in excess of this sum is filed within 30 days from the filing of this opinion, the judgment as so modified will stand affirmed; otherwise reversed.

STRUBLE v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa, April 12, 1905.)

[103 N. W. Rep. 142.]

Vice Principal—Injuries to Members of Train Crew—Negligence of Brakeman While Making Up Train.*—A brakeman engaged with a train crew in switching to make up a train had the switching list from which he learned what cars were to be taken into the train and the position which each was to occupy. On the basis of the list the train was made up. It was his duty to uncouple the cars as required. The crew acted solely in response to signals given by him. Held, that he was a vice principal rendering the railway company liable for injuries to members of the crew occasioned by his negligence.

Care Required While Switching Cars.—One in control of an engine drawing cars from a side track to the main track, and then sending some of the cars down the main track and others down the side track, is required to see that the cars sent down the main track have gone far enough from the switch to enable a car to pass onto the side track before he gives the signal to kick back a car onto the side track.

Proximate Cause.—In an action against a railway company for injuries to a brakeman while engaged in switching, evidence examined, and held to warrant a finding that the negligence of the employee in charge of the work was the proximate cause of the injury.

Same—Injury to Brakeman.—In an action against a railway com-

*For the authorities in this series showing who are vice principals, or superior servants, whose negligence other employees do not assume, under the fellow-servant rule, see foot-note appended to *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544 (as to what are the duties of a railroad company which it cannot delegate so as to escape liability for injuries to its employees under the fellow-servant doctrine); *Cleveland, L. & W. Ry. Co. v. Shanower* (Ohio), 13 R. R. R. 147, 36 Am. & Eng. R. Cas., N. S., 147 (conductor's status as superior of brakeman not affected by parting of train); foot-note appended to *Hoe v. Boston & N. St. Ry. Co.* (Mass.), 14 R. R. R. 288, 37 Am. & Eng. R. Cas., N. S., 288 (foremen and hands); foot-note appended to *McHugh v. Manhattan Ry. Co.* (N. Y.), 14 R. R. R. 284, 37 Am. & Eng. R. Cas., N. S., 284 (train dispatchers and telegraph operators); foot-note appended to *Fullmer v. New York Cent. & H. R. R. Co.* (Pa.), 13 R. R. R. 817, 36 Am. & Eng. R. Cas., N. S., 817 (inspectors of appliances, etc.); extensive note appended to *Alabama Great Southern R. Co. v. Baldwin* (Tenn.), 14 R. R. R. 9, 37 Am. & Eng. R. Cas., N. S., 9 (conductors with respect to other members of their train crews);

Struble v. Burlington, etc., Ry. Co

pany for injuries to a brakeman, evidence examined, and held to warrant a finding that plaintiff was not guilty of contributory negligence.

Negligence—Definition—Instruction.—An instruction in a personal injury action that negligence means the failure to use "that degree of care which the law requires; that is, ordinary care, or the doing of that which ordinary care * * * would dictate should not be done," is not open to the objection that matters of omission are excluded from consideration.

Excessive Verdict.—In a personal injury action the injury to plaintiff was in the loss of his left arm and in the pain and suffering incident thereto. At the time of the injury he was 27 years old. He had been a brakeman for about a year, earning from \$60 to \$75 a month, and prior to that time he had been a farm hand. Held, that a verdict for \$12,000 was excessive, and should be reduced to \$7,500.

Appeal from District Court, Tama County; Obed Caswell, Judge.

Action for damages for a personal injury. In the main the facts are not involved in controversy. At the time of his accident and injury plaintiff was in the employ of defendant as a freight brakeman. The accident occurred in the yards of the defendant at Muscatine, and while the train crew to which plaintiff belonged was engaged in switching to make up a train destined for Cedar Rapids. The train crew consisted of a conductor, the engineer and fireman in charge of the engine, and two brakemen—one Moore, and plaintiff. The conductor was temporarily absent at the time, and the switching was being done by the engine crew and the two brakemen. The main line of the track runs nearly north and south, with a side track on the west. The latter connects with the main line in the usual manner by a switch. The rails of the side track diverge from the main track until a point is reached where passing cars will clear each other, and then run parallel with the main track. The switch was controlled from a stand located immediately adjacent to and on the west side of the track. At the time the engine was

foot-note appended to *Jones v. Kansas City, etc., R. Co. (Mo.)*, 10 R. R. R. 364, 33 Am. & Eng. R. Cas., N. S., 364 (employees charged with duties to furnish proper appliances and safe place to work); foot-notes appended to *Shaw v. Manchester St. Ry. (N. H.)*, 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275 (yardmasters and roadmasters); *St. Louis S. W. Ry. Co. v. Kelton (Tex.)*, 2 R. R. R. 279, 25 Am. & Eng. R. Cas., N. S., 279 (brakeman was agent of company to see that switch was properly set, and not injured engineer's fellow servant); foot-note appended to *Wilson v. Charleston & S. Ry. Co. (S. Car.)*, 9 Am. & Eng. R. Cas., N. S., 211 (criterion as to whether an employee is a vice principal); *Rush v. Spokane Falls & N. Ry. Co. (Wash.)*, 20 Am. & Eng. R. Cas., N. S., 285 (servant given charge of dynamite as a vice principal); *Union Pac. Ry. Co. v. Doyle (Neb.)*, 7 Am. & Eng. R. Cas., N. S., 773 (test as to who are vice principals); *Bussey v. Charleston & W. C. Ry. Co. (S. Car.)*, 11 Am. & Eng. R. Cas., N. S., 474; *Walker v. Gillett (Kan.)*, 10 Am. & Eng. R. Cas., N. S., 140; *Wright v. Northampton & H. R. Co. (N. Car.)*, 10 Am. & Eng. R. Cas., N. S., 151; *Louisville, N. A. & C. Ry. Co. v. Heck (Ind.)*, 11 Am. & Eng. R. Cas., N. S., 382 (division superintendents are vice principals).

Struble v. Burlington, etc., Ry. Co

headed north, and had been backed in upon the side track, and there coupled to four freight cars. It then pulled north past the switch, and upon the main line, stopping so that the rear car was some two car lengths north of the switch. As the cars were being pulled past the switch, plaintiff went to the switch stand, turned the lever so as to disconnect from the side track and leave the main line free for passage. Moore, who had passed on with the cars, then uncoupled the two rear cars, when the engine was backed down, making a "kick" as it is called; that is, making a quick backward movement and then stopping, the momentum being sufficient to run the uncoupled cars down upon the main line past the switch. As such cars passed over the switch, plaintiff at once turned or threw the lever, thereby again making connection with the side track. As the engine stopped, the rear car, still attached thereto, was between one and two car lengths north of the switch. When the switch had been turned by plaintiff, Moore, who had remained with the cars still attached to the engine, at once uncoupled the rear car, and in response to his signal the engineer made a kick to run the car back in upon the side track. It appeared from the testimony of Moore given on the trial that as he cut the car off and it started back he glanced down the track, and realized it was likely that such car would collide with the cars on the main track. He at once called to plaintiff to catch the car, which we understand to mean to go upon it, and by means of the brake operated from the top control the movement thereof. In response to such call, plaintiff at once stepped over and met the car. The car was provided with an end ladder, the same being close to the side to the west, and this plaintiff took hold of, and proceeded to climb to the top. The two cars that were sent down the main track had not in fact proceeded quite far enough to clear a car passing in upon the side track, and as plaintiff got upon the car the corner thereof struck the corner of the north car standing on the main line, the impact causing him to lose his balance and to fall or be thrown from the top of the car to the ground. Such further facts as are material will be referred to in the course of the opinion. The case was tried to a jury, and from a verdict and judgment in favor of plaintiff the defendant appeals. Reversed.

Carroll Wright, John I. Dille, and Willett & Willett, for appellant.

Charles A. Clark & Son and Struble & Stiger, for appellee.

BISHOP, J. By a motion to direct a verdict in its favor, and again by motion for new trial, the defendant challenged the sufficiency of the evidence to make out a case for recovery on the part of plaintiff. The gravamen of plaintiff's action is negligence on the part of defendant, to which he did not contribute, and the allegations of the petition devoted to the subject may be summed up as follows: That defendant negligently and carelessly placed the two freight cars on the main track, and so near

Struble v. Burlington, etc., Ry. Co

to the side track that the car plaintiff was ordered to catch could not pass along the side track without coming in collision therewith, the fact of the position of such cars being unknown to plaintiff; that defendant was further negligent in throwing the car which plaintiff was ordered to catch in upon the side track, and moving such car along the same while the cars placed upon the main track remained thereon so that said car would collide therewith; that defendant and its employees were negligent in ordering and requiring plaintiff to catch said car while the same was approaching a collision with the cars on the main track. The contention of appellant is that the record fails to disclose that the accident and injury complained of was proximately caused by negligence on its part; that, on the contrary, the evidence makes it clear that such accident was the direct result of a failure on the part of plaintiff to exercise ordinary care and to perform a known duty imposed upon him. In proceeding to determine the matter of controversy thus presented, we may begin by ascertaining what were the respective duties and responsibilities resting at the time upon the two men, Moore and the plaintiff, as far as disclosed by the evidence. And first as to Moore. We shall not go to the trouble of bringing forward the evidence in detail. It is sufficient to say that, viewed in the light most favorable to plaintiff, as we are required to do, a finding was warranted to the effect that Moore was in control of the work. In point of fact, he represented the conductor. He had the switching list, from which he learned what cars were to be taken into the train, and the position which each thereof was to occupy, and it was upon the basis of such list that the train was being made up by him. It was his duty to cut off or uncouple the cars as required, and it appears that the engine crew acted solely in response to signals given by him. In every material respect, therefore, his relation to the work was that of a vice principal, and not that simply of a co-employee. Now, as to plaintiff, it appears that his working position was at the rear, and it is made clear by the evidence that it was his duty to catch the cars as they were kicked back on the proper track, and to see that they went into clear, and to their proper places. In addition to this, there is support in the evidence for the claim as made by plaintiff that it was his duty to obey orders coming from Moore having relation to the work being done.

Having the situation in its material aspects before us, we may take up the question whether a finding of negligence on the part of defendant was warranted. As we think, the situation admits of but one answer to such question, and that an affirmative one. A finding that Moore was in authority amounts to a finding that it was his duty to so order the work as to avoid accidents. He was in control of the engine, and he should have seen to it that the cars sent down the main line had gone into the clear before he gave the signal to kick back the third car. There is no pretense that the situation was not open and visible to him, and the

Struble v. Burlington, etc., Ry. Co

jury had warrant for finding that in the matter of cutting off the cars and sending them back he had acted solely upon his own motion. As to the fact of the collision, then, it is quite within reason to conclude that the same was the direct result of a want of due care on his part. Now, Moore having, by his own act, brought about a condition fraught with danger, it is quite an easy step to say that he had no right to order plaintiff, abruptly and without warning, into the face of the threatened danger, and thus leave him to take the chance of any accident that might result therefrom. As the jury may have found that plaintiff was unaware of the danger, it follows that a conclusion of negligence on the part of defendant was fully warranted. The following cases are in point: *Fox v. Railway*, 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 289; *Strong v. Railway*, 94 Iowa, 380, 62 N. W. 799; 4 Thompson on Negligence, § 3814 et seq.

We turn now to the question, was plaintiff himself in the exercise of due care? As bearing upon this question, these additional facts, which the evidence tended to prove, may be stated: The third car was cut off by Moore at once upon the throwing of the switch by plaintiff, and this was barely accomplished when the order was given to plaintiff to catch the coming car. Had plaintiff then looked, he could have seen that the cars on the main track were still moving, but he says that he had no time to wait and see if they reached the clear. Further, he says that he did not have time to ascertain the cause of the order to catch the car, either by inquiry or by inspection, as the rapidly moving car was upon him, and he had no alternative but to obey such order. And this the jury may very well have believed in view of the fact that the car was but little, if any, more than its length away when the kick was made, and the entire action must have been confined to but a few seconds of time. Conceding, then, that it was the duty of plaintiff, generally speaking, to see that all cars went into clear or to a place of safety, still out of the situation here presented we cannot say that the jury was not justified in finding that for the moment he was relieved of such duty, and was called upon to give his entire attention to the duty of catching the car as it moved down over the switch. Plaintiff says that he could not do two things at once, and his statement is not altogether unreasonable. Now, as plaintiff caught the car and proceeded to climb to the top, his back was to the south, and he says that before he could turn around and advise himself as to the situation, the collision came, and he was thrown to the ground. *Harker v. Railway*, 88 Iowa, 409, 55 N. W. 316, 45 Am. St. Rep. 242. The appellant railway contends with much earnestness that the act of plaintiff in throwing the switch as soon as the main line cars had passed over was, in effect, an invitation to Moore to send back the third car; and, accordingly, that plaintiff was negligent in that he misled Moore into believing that such third car could be cut off in safety. It is sufficient to say that this involved a question for the jury, and very properly

Struble v. Burlington, etc., Ry. Co

they may have concluded that, instead of being misled, Moore's act was purely the result of his own carelessness in failing to observe what it was his duty to observe. Moreover, we cannot say that the jury were not warranted in finding that it was not a proper act on the part of plaintiff to at once throw the switch, and thus be ready for the car when Moore, in the exercise of due care, should cut it off and send it back in safety. Without any further discussion of the facts appearing in the record, we conclude that the jury were warranted in finding the material allegations of the petition to be true in fact, and therefore that the trial court in such respect rightly refused to set aside the verdict.

2. Appellant complains of the giving of certain instructions as follows: In the ninth instruction it is said that "negligence means the failure to use or exercise that degree of care which the law requires; that is, ordinary care, or the doing of that which ordinary care and caution would dictate should not be done." In the tenth instruction ordinary care is defined, and in the eleventh it is said that "contributory negligence would be negligence, as above defined, on the part of the plaintiff, uniting with the negligence of the defendant, and contributing to the result and injury and damage complained of." The ninth instruction is said to be erroneous for that but one thought is presented thereby, and that is that negligence may be imputed only in connection with acts of commission. If the instruction is vulnerable to such criticism, it is manifest that, considered by itself, it was unduly favorable to defendant. The contention for prejudice, however, is based upon the language used in the eleventh instruction, wherein it is said that contributory negligence is "negligence as above defined," etc. It is true enough that negligence involves matters of omission as well as commission. But we think the ninth instruction is not open to the criticism that matters of omission are thereby excluded from consideration. The fault of the instruction, as it appears in the printed record, is with the punctuation; that is, the semicolon after the word "requires" and the comma after the expression "ordinary care," as it first appears, should be transposed. The instruction would then read, in substance, that negligence may consist of a failure to use or exercise ordinary care, or in the doing of that which ordinary care dictates should not be done. We have no doubt but that such was the understanding intended to be, and which was in fact, conveyed to the jury by the reading of the instructions. Other instructions are complained of, and as to each we have given due consideration, with the result that we find no prejudicial error.

3. The verdict and judgment was for the sum of \$12,000, and appellant complains thereof as excessive. We think the complaint is well founded. The injury to plaintiff was in the loss of his left arm and in the pain and suffering usual to an injury of that character. At the time of his injury he was 27 years of age. He had been a brakeman about a year, and prior to that

Hull v. Northern Pac. Ry. Co

a farm hand. His wages as a brakeman was from \$60 to \$75 per month. Our cases bearing upon the subject are familiar to the profession, and we need not go over them. From what we have said it is manifest that there must be a reversal on the sole ground that the judgment is excessive. This, however, is upon condition that plaintiff may, if he so elects, within 30 days from and after the filing of this opinion, file a remittitur of all that portion of the judgment over and above the sum of \$7,500, in which event the judgment as for such sum will stand affirmed; otherwise it will be reversed, and a new trial ordered.

Reversed.

HULL v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit, February 28, 1905.)

[136 Fed. Rep. 153.]

Master and Servant—Injury to Servant—Fellow Servant—Incompetency—Assumption of Risk.—Plaintiff, the most experienced of 14 men working in the yard of defendant's railroad shops, had knowledge of the incompetency of four other servants to pile lumber, and that they had piled lumber in the yard. Plaintiff, with another servant, had previously fixed a leaning pile that was likely to fall, which had been piled by such incompetent servants, but made no objection to their employment, and was injured while taking lumber from another pile which had also been improperly piled by them. The defects in such pile were in plain view, and plaintiff's only excuse for not seeing it was that he did not take particular notice, because his attention was on his work. Held, that plaintiff assumed the risk.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This is an action for damages for personal injuries received by the plaintiff in error while in the employ of the defendant in error, through the falling of a lumber pile from which he was removing certain heavy timbers. The trial court directed the jury to return a verdict for the defendant in error, which was accordingly done, and judgment entered thereon. The plaintiff in error excepted to this action of the court, and sued out a writ of error to this court.

It appears from the pleadings and testimony that the plaintiff

*See foot-note appended to Metropolitan West Side Elec. Ry. Co. v. Fortin (Ill.), 9 R. R. R. 77, 32 Am. & Eng. R. Cas., N. S., 77; Indianapolis & G. R. T. Co. v. Foreman (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214; Hicks v. Southern Ry. Co. (S. Car.), 4 R. R. R. 540, 27 Am. & Eng. R. Cas., N. S., 540; Morbey v. Chicago N. W. Ry. Co. (Iowa), 1 R. R. R. 371, 24 Am. & Eng. R. Cas., N. S., 371; foot-note appended to Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex. Civ. App.), 4 R. R. R. 564, 27 Am. & Eng. R. Cas., N. S., 564; Parker v. New York Cent. & H. R. R. Co. (N. Y.), 10 Am. & Eng. R. Cas., N. S., 614; Hicks v. Southern Ry. Co. (S. Car.), 21 Am. & Eng. R. Cas., N. S., 217.

Hull v. Northern Pac. Ry. Co

in error is a citizen of the state of Washington, and the defendant in error a corporation organized under the laws of the state of Wisconsin, owning and operating railroad shops at Tacoma, Wash.; that in the inclosure surrounding said shops there was a large space used as a lumber yard, for the purpose of receiving, unloading, and piling lumber and timbers for use in the said shops, and that this yard was under the general supervision of a foreman, who had charge and control of the men working therein; that along and through said lumber yard, and extending into the shops, there were railroad tracks for the purpose of hauling cars loaded with lumber, and receiving lumber and timbers, into the yard, and for the purpose of conveying lumber and timbers on trucks or cars into the shops; that the plaintiff in error had worked for the defendant in error at said yard most of the time for two years prior to the accident; that on the 25th day of November, 1902, about 5:30 o'clock in the evening, the plaintiff in error and three others who had just come into the mill were told by the foreman of the yard to go and get some timbers of specified dimensions, which they would find somewhere up the yard between the tracks. They took a truck and proceeded up one track, and, after having switched to a second track, they came to a pile where they saw the timbers they wanted, between the tracks, piled parallel with the tracks. There was some decking on top of the pile, which they removed, and then proceeded to take away the first tier, which was about four feet in height. While doing so, some heavy timbers of the second and third tiers of the pile, about eight feet high, fell upon the plaintiff in error, crushing his back and legs, injuring his spine, producing permanent paralysis of the lower limbs, and otherwise injuring him for life. For the injuries received he claims damages in the sum of \$20,000, alleging that the defendant in error was entirely responsible for the accident, in employing incompetent men, namely, four Swedes inexperienced in the work, who failed to securely bind and stay the said timbers and lumber when piling it; that defendant in error knew of the incompetency of said workmen, and negligently failed to instruct them in the work of piling and handling lumber. It is further alleged that the plaintiff in error did not know that the said incompetent workmen had piled this particular pile of lumber, and, owing to the darkness at the hour of the accident, was not in a position to know of the unsafe condition thereof, and was not warned of it by the defendant in error. As matter of defense the defendant in error pleads that the accident resulted wholly through the careless and negligent conduct of the plaintiff in error in failing to take any precaution for his safety; that the said lumber was piled by employees of the defendant in error, and in the work of moving timbers therefrom the plaintiff in error was assisted by other employees, all of whom were engaged in a common service and employment, and were fellow servants and co-employees of the plaintiff in error; that the accident was therefore occasioned by

Hull v. Northern Pac. Ry. Co

the acts of fellow servants of the plaintiff in error. The plaintiff in error testified that there were 12 or 14 men working in the yard at that time. Among this number were four Swedes, who went to work in the yard some time in the previous August. They were not considered competent men to pile lumber by the men who were working around the yard. The plaintiff in error knew that they were incompetent men; he believed he could tell an incompetent man when he saw him at work. He knew these incompetent Swedes piled lumber, and that they piled it up in any way, just as one who does not know how to pile lumber does it. He had seen gangs working there where they had no one with them who understood the work of piling lumber, and he noticed that some of the piles were not piled right. When he had taken particular notice, he had seen piles that were not properly piled. He remembered seeing one pile in the yard that was improperly piled, and he and another pried it over, as it was leaning and was likely to fall on some one. He testified that all the defects of this particular pile were in plain view if he had taken any particular notice of it, but his attention was on his work, and he did not notice how the timbers were piled. They were not directed to any particular pile when they were sent up the yard for the timber by the foreman. They were removing the second tier when the pile fell. The court asked the question: "To whom did the foreman give this particular order for timbers? A. Well, he gave it to me. Q. Did you have charge of filling this order? A. I was the oldest and most experienced man there, and I presume he gave it to me with the idea that I would take the order and find the timbers." O. W. Lewis testified that he worked in the lumber yard. He remembered the four people working there, called the four Swedes. They were very careless, and did not know how to pile lumber, and did not seem to try to learn. He saw three of them piling the lumber which fell and injured the plaintiff. This pile was placed there the last of October or the first week in November. Tom Lot worked in the lumber yards, and was acquainted with the four Swedes; saw them handling lumber. They did not act as if they knew very much about it; they handled it very awkwardly, and, when they were piling by themselves, he testified that they just threw it up in any old shape. Other witnesses testified that the four Swedes were employed to handle lumber; that they handled it very awkwardly. They had been there about two months before the plaintiff in error was injured. Their general reputation about the yard was very poor.

Gornor Teats, for plaintiff in error.

B. S. Grosscup, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts, delivered the opinion of the court.

The plaintiff in error contends, in effect, that the only ques-

Hull v. Northern Pac. Ry. Co

tion to be decided in this case was whether the plaintiff was guilty of contributory negligence in failing to use the care which a man of ordinary prudence would have exercised under like circumstances to prevent injury to himself, and that the evidence was not so conclusive against him as to justify the court in directing a verdict for the defendant, but was a question that should have been submitted to the jury for determination under proper instructions from the court. The defendant in error contends, on the other hand, that the evidence introduced on behalf of the plaintiff established the fact that he assumed the risk of the employment in which he was engaged at the time of the injury, and that he was therefore not entitled to recover.

The defense of an assumed risk was set up in the answer of the defendant, and was submitted to the court in the motion of the defendant to instruct the jury to return a verdict for the defendant. The doctrine of an assumed risk here referred to is that where a servant enters into or remains in an employment with a knowledge of defects in the master's premises, and of the danger incident thereto, and continues in the service without objection and without promise of change, he is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover from injuries caused thereby. Was the plaintiff chargeable with such knowledge? He was the oldest and most experienced man employed in the lumber yard. The order to get the timbers was given to him. The plaintiff testified that the order was given to him probably because he was the oldest and most experienced man there. He was acquainted with the four Swedes. He knew that they had been at work in the yard since the previous August, and that they were incompetent. He could tell an incompetent man when he saw him at work. He knew these incompetent Swedes piled lumber, and that they piled it up in any way, just as one does who does not know how to pile lumber. He had seen gangs working there where they had no one with them who understood the work of piling lumber, and he noticed that some of the piles were not piled right. He saw one pile in the yard that was improperly piled, and he and another man pried it over, as it was leaning and was likely to fall on some one. All the defects of the pile that fell on plaintiff and injured him were in plain view, if he had taken any particular notice, but his attention was on his work, and he did not notice how the pile was piled. There is no evidence that the plaintiff objected to the employment of these four incompetent Swedes in the piling of lumber, or that he gave notice to any one in charge of the work or of the premises that their employment was rendering the premises dangerous, and he does not appear to have had any promise from any one in authority or otherwise that such dangers would be removed or abated. The only evidence that can be claimed to in any way qualify plaintiff's knowledge of the defective premises was the fact that there were 12 or 14 men working in the yard at that

Bowen v. Illinois Cent. R. Co

time, and that he did not know that these incompetent workmen had piled the particular pile of lumber that fell and caused the injury. But the fact remains that he knew they were employed in piling lumber; that at least one dangerous pile had been found, and that he and another workman had removed that danger; and that the defects of the pile that fell were in plain view. His excuse is that he did not take particular notice, for the reason that his attention was on his work. But the law does not admit of this excuse. The servant must not go blindly to work where there is danger. He must open his eyes and take notice of his surroundings. He must see those things that are open to observation, and, if he fails in this respect, the risk is his own. The defective condition of the premises where plaintiff was employed was so obvious, and the knowledge of the plaintiff with respect thereto so complete, that only one inference could be drawn therefrom, and that was that he assumed the risk of the employment, and, upon the evidence, this was a question for the court.

The judgment of the court below is affirmed.

BOWEN v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Eighth Circuit, March 13, 1905.)

[136 Fed. Rep. 306.]

Railroads—Action for Wrongful Death—Tort of Servant.—Under section 746, Rev. Code Civ. Proc. S. D., giving to the widow of the deceased a right of action for damages against a railroad company for the killing of her husband, by reason of the neglect, carelessness, or unskillfulness of the corporation, its agents, servants, and employees, the cause of action must come strictly within the terms of the statute conferring the right, and cannot be extended to any other subject or embrace any other quality of liability.

Same—Torts of Employees—Scope of Employment.*—Such loss of life must result from the negligence, carelessness, or unskillfulness of such agent and servant while engaged in and about the work assigned him by the master. Therefore, where the act complained of is the killing of plaintiff's husband by defendant's station agent while deceased was signing a receipt book for a package, it cannot be assumed that such package pertained to railroad freight matter, when the evidence showed that the wrongdoer was not only at the time and place acting as agent for an express company, as well as the railroad company, without some evidence warranting the inference that the package pertained to railroad freight, rather than express matter.

Same.*—There is a marked distinction between an act done by the servant during his employment and an act done within the scope of his employment. To bind the master for an injury done by the servant, the servant must at the time be acting for the master within the scope of the duty assigned him.

*See foot-note appended to *Louisville & N. R. Co. v. Routt* (Ky.), 10 R. R. R. 344, 33 Am. & Eng. R. Cas., N. S., 344; foot-note appended to *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244; *Letts v. Hoboken R. W. & S. Con. Co.* (N. J.), 11 R. R. R. 139, 34 Am. & Eng. R. Cas., N. S., 139.

Bowen v. Illinois Cent. R. Co

Same.*—The distinction between the liability of the master for the wrongful acts of the servant in the instance of the relation of carrier and passenger, or hotel keepers and proprietors of theatres and their guests, and that of the proprietor of a mere business house or railroad station, as to persons coming on the premises to transact some matter connected with its general business, pointed out.

Same—Evidence.*—The deceased, having called at the railroad station to inquire of the agent as to whether any demurrage would be charged on account of his failure to unload a car of coal that day, and, being assured in the negative, turned to walk out of the room, when the agent said to him, "There is a package here for you," and handed to him, through the ticket window, a small book to be signed. Just as deceased started to sign his name therein, the agent picked up a pistol, and without a word shot the party to death. Held, that the widow could not recover damages against the railroad company for such wanton act of killing.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of South Dakota.

This is a writ of error to review the action of the Circuit Court in directing a verdict for the defendant. After statements, by way of inducement, the gravamen of the petition is: That one Henry A. Steagald was a man of dangerous and violent character, subject to sudden fits of anger, disregarding of the persons and lives of others, and was not a fit man to have charge of the station house and depot of a common carrier, all of which was well known to the defendant; that, in disregard of its duty to the public and to one Frank Bowen, the defendant did, with knowledge of all of said facts, and the disposition of said Steagald, retain him in its employ in the position of station agent at Ben Clare, in the state of South Dakota; that on the 27th day of February, 1903, the said Frank Bowen, in the pursuit of his business with the defendant railroad company, as a common carrier, entered said station house to transact business with the defendant as common carrier, through the said agent, Steagald, respecting a car of coal shipped to said Bowen over the defendant's road to Ben Clare; that said Steagald, then and there acting as such agent and in the course of his employment, while said Bowen was in the discharge of his lawful business with the defendant, did shoot and kill the said Bowen, to the damage of the plaintiff, who is the surviving widow of the deceased, in the sum of \$20,000. The answer of the defendant admitted that said Steagald was at the time in question the station agent of the defendant at said Ben Clare, and that he was authorized to transact for defendant such business as is usually and properly transacted by railroad station agents situated similar to the one at Ben Clare, but specifically denied that the said Steagald was at said time or at any other time its general managing agent, or general agent, in any character whatsoever. With the exception of admitting that the defendant was a railroad corporation organized under the laws of the state of Illinois, and that said Bowen was

*See foot-note on preceding page.

Bowen v. Illinois Cent. R. Co

shot and killed by said Steagald, it denied all the other material allegations of the petition.

The evidence in the case is exceedingly brief. Earl Bowen, the son of said Frank Bowen, aged 13 years, testified that he had known said Steagald, the depot agent for the defendant at Ben Clare, for about six months prior to the 27th day of November, 1903; that on that day, in company with his father, who had an elevator and coal yard at Ben Clare, he entered the waiting room of the depot at that place; that the waiting room is separated from the depot agent's office by a partition, in which there is a door and the ticket window; that Steagald was at the open ticket window when his father asked Steagald if he would charge demurrage on a car of coal on a day like that. Steagald answered that he did not think so. Thereupon the witness and his father started to leave the depot, when Steagald called to his father and said there was a package there for him, whereupon his father turned around to the ticket window; that Steagald handed out a book about a foot square, in which his father started to write his name, when Steagald reached to one side, quickly jerked up a revolver, and shot his father, and then, running through the door which leads into the waiting room, again shot him, and, as the witness jumped between the door and the stove, he was shot and injured by Steagald. Steagald did not say anything, and went back into the office. His father died that day. On cross-examination he testified that Steagald did not tell his father what kind of a package he had there. He simply said there was a package. The plaintiff testified that, when informed by her son of the occurrence, she went immediately to the depot and found her husband dead; that Steagald and his wife were in the depot office at the ticket window; that he spoke to her, but she did not recollect what he said; that she had known Steagald since October, 1902; that Ben Clare is a small station, and Steagald was station agent for the defendant road; that Steagald did the operating business there, handled the freight business, and acted as express agent; that he received express packages and telegrams. This was all the testimony.

At the request of defendant's counsel the court instructed the jury to return a verdict for the defendant, which was accordingly done, and judgment was entered thereon for the defendant.

Joe Kirby, for plaintiff in error.

W. S. Kenyon (*C. O. Bailey* and *J. M. Dickinson*, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

As the plaintiff at common law could not maintain any action against the defendant railroad company to recover damages for the killing of her husband by a person in the employ of the cor-

Bowen v. Illinois Cent. R. Co

poration, her right of action exists, if at all, by virtue of some statute of the state of South Dakota. The only statutory provisions touching this matter are sections 745 and 746 of the Revised Code of Civil Procedure of South Dakota, which are as follows:

"Sec. 745. If the life of any person, not in the employment of a railroad corporation, shall be lost, in this state, by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness, or negligence, or carelessness of their employees or agents, the personal representatives of the person whose life is so lost, may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue.

"Sec. 746. If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants, or employees, then the widow, heir, or personal representatives of the deceased, shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid."

As the liability thus created is the creature of the statute, an action predicted thereon must come within its terms. The statute cannot be extended to any other subject, or embrace any other quality of actionable liability. The loss of life must be "by the neglect, carelessness, or unskillfulness of the corporation or corporations, their agents, servants, or employees." To show the liability on the part of the defendant company the petition charges that said Steagald was a dangerous, unfit, and incompetent person to be placed in the position he was by the defendant railroad company; that this fact was known to the company at the time of his employment; and that with this knowledge it continued him in its service. There is in this record not a word of evidence to support this allegation, unless it can be maintained, as a matter of law, that a single act of willful homicide by the agent, committed after his employment, is proof, not only of general unfitness of the servant, but of the antecedent knowledge of the employer. It is so well settled as not to justify the citation of authorities that the presumption of law exists that the master has exercised due care and circumspection in the selection of a competent servant, and the burden rests upon him who asserts the negligence to affirmatively prove, not only the fact of incompetency, but the want of due care by the master in making the selection. Neither can the fact of such incompetency be established by proof of a single act of carelessness or recklessness after the contract of employment.

The plaintiff's evidence shows that Steagald had for six months prior to the killing of Bowen held the position of station agent at Ben Clare. There is no evidence that prior to this homicide even a delict had been imputed to this servant. In view of the

Bowen v. Illinois Cent. R. Co

facts disclosed by the plaintiff's evidence, which presumably were in the mind of her counsel when he framed the petition, it is manifest that his first conception of the law was that no responsibility attached to the railroad company for this wanton, reckless act of Steagald, unless it could be made to depend upon the negligence of the company, either in selecting such an agent, or in retaining him after having notice of his vicious character. The injury having been inflicted by the agent, the liability of the corporation can only arise by reason of the agent's neglect or carelessness in and about the conduct of the business to which he was assigned by the company. By the very terms of the statute the wanton act or conduct of the agent, which does not include neglect or carelessness in the prosecution of the agency, imposed no accountability on the master therefor, for the palpable reason that the statute giving the right of action in effect excludes it.

On the facts developed by the evidence it requires some restraint to discuss with patience the contention that in killing Bowen, Steagald did the act negligently or carelessly in performing the work assigned him by the master. At the utmost the only inference possible is that Steagald was in the employ of the railroad company as its station agent at Ben Clare; that within the compass of his agency was the selling of tickets to passengers and receiving and delivering railroad freight. Bowen was not at the station as a passenger to buy a ticket. He was not there to deliver or receive freight. He went there solely for the purpose of making inquiry as to whether any demurrage would be exacted for the failure to unload a car of coal that day. When he was answered that in the opinion of the agent there would not be such demurrage, and he turned away, that matter was concluded. The assault committed had no legal relation thereto. When he was recalled by the statement that there was a package for him, and he was shot by Steagald while in the act of signing the receipt book therefor, in order to make out a case against the railroad company, it developed upon the plaintiff to prove that such package pertained to the business of the railroad company. The plaintiff's evidence showed that Steagald not only had charge of freight matters at that station, but also of matters pertaining to the express company. The evidence did not show that the package pertained to the business of the railroad company. If the package referred to was express matter, it did not pertain to the railroad as such, and therefore Steagald did not appear to be acting for the railroad company at the time. Whether the package came as railroad freight or as express matter was left entirely to the conjecture of the jury, to guess off. If this important fact was to be submitted to the chances of guessing right, there was not only as much, but better, reason for guessing that it was express matter. Signing a book at or near the window of the office would rather indicate that it was a receipt book for an express than a freight package. No pack-

Bowen v. Illinois Cent. R. Co

age was displayed, and we do not know, save by the imputed statement of Steagald, that any package in fact was there to be delivered. As Steagald stood at the window of the ticket office, the indication was, when the book was signed, the package would be handed out through the window, not a place for the delivery of such bulky packages as would usually come by freight. Facts affirmatively established by tangible proofs, not conjectures, are essential to a right of recovery. Evidence that leaves the jury to roam at will in the field of conjecture and speculation to find a verdict can no more be tolerated by courts of justice than a judgment without any evidence. *Central Coal & Coke Company v. Hartman*, 111 Fed. 98, 100, 49 C. C. A. 244. On this ground alone the action of the Circuit Court in directing a verdict for the defendant might well be sustained. But, assuming that it was an actual freight package, a verdict for the plaintiff ought not to be upheld on the proofs.

The broad postulate laid down by counsel for plaintiff in error is that the railroad company owes the duty to every person who comes upon its premises to transact any business pertaining to railroad operations to protect him against personal assaults by its agents or servants at the time in charge of such premises. If this is to be established as incident to the relation between such master and servant, it will be far-reaching in its application, and would extend the doctrine of respondeat superior beyond any authoritative precedent. "Beware of analogies!" is a wholesome warning in applying the law of one class of subject indifferently to another. Many decisions and utterances of courts, in cases growing out of the relation between carrier and passenger, are cited to support this action. The distinction between such cases and this is broad and obvious. The relation between carrier and passenger in the first place is contractual. From the moment the passenger comes to purchase his ticket and enters the train to the end of his journey he passes measurably under the control and direction of the agents and servants of the carrier, upon whom the law imposes the correlative duty of protecting him against insults, assaults, and injuries perpetrated by them, or others on the train, in so far as they can reasonably do so. As said by this court in *Clancy v. Barker*, 131 Fed. 161, 165, 166.

"The carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. * * * The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep; while the passenger submits to the rules, regulations, and directions of the carrier, and is transported in the manner the latter directs. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely * * * is constantly acting within the scope and the course of his employment while

Bowen v. Illinois Cent. R. Co

he is upon the train, * * * because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or willful act of such a servant, which inflict injury upon the passenger, is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond."

Conformably to this ruling it was said, in *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 638, 7 Sup. Ct. 1039, 30 L. Ed. 1049:

"A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment."

It should, however, logically follow, from the premise on which this ruling is imposed, that, where the exceptional conditions on which it is propounded do not exist, the rule should not apply. In the case of the station agent, employed by the railroad company to receive and deliver freights, he is not expressly or impliedly commissioned by his employer to exercise any direction or control over the movements of the person shipping or receiving freight. It is the duty of the carrier of freight to furnish a reasonably safe place and means for receiving from and delivering to the customer his consignment. It is likewise a duty the company owes to such customer to furnish reasonably careful and competent servants to transact such business, and to see that they exercise due care in handling and delivering freight to the customer, so as not to injure him. For any neglect on its part in these respects, or inattention on the part of the servant while thus engaged in the course of the business committed to him, whereby the customer sustains injury and damage, the company is liable.

Confusion now and then appears in applying the law of responsibility of the master for the wrongs of the servant in not keeping in mind the distinction between the act done by the servant within the scope of, rather than during, his employment. Wood, in his work on the Law of Master and Servant, directs attention to this distinction in section 286:

"If the act of the servant is not expressly ordered by the master, or within the scope of his employment, the master is not liable therefor, even though done in the course of his employment. The question is whether the act was expressly or impliedly authorized by the master, and this is a question to be determined by the jury, in view of the employment, its character, the nature of the services required, the instructions given by the master, and the circumstances under which the act was done.

* * * A master is liable for the act of his servant, done in the course of his employment about the master's business. But he is not responsible for an act done outside of his employment, nor for the wanton violation of the law by him."

In section 307 he says:

"The simple test is whether they were acts within the scope of

Bowen v. Illinois Cent. R. Co

his employment—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him."

So it is said, in *Elliott's Law of Railroads*, vol. 3, p. 1009:

"The general rule is that the master is liable for the willful acts of the servants with reference to the master's orders, or within the scope of their employment or the line of their duty, but not otherwise."

If the act done by the servant is within the scope of his employment, it is immaterial that it is wantonly done. The master is responsible for the manner in which it is done. This is illustrated by the following adjudged cases:

In *Texas & Pacific Ry. Co. v. Hayden* (Tex. Civ. App.) 26 S. W. 331, a boy boarded a freight train and paid his fare to the brakeman. Before reaching his destination he was ordered off by the brakeman. On his refusal the brakeman knocked him off with a piece of coal. It was held that, if the brakeman had authority to eject the boy, the company would be liable, because he was guilty of excessive means in accomplishing the service while acting in the scope of his employment.

This was true in *Pierce v. N. C. R. R. Co.* (N. C.) 32 S. E. 399, 44 L. R. A. 316. The brakeman had the right to eject parties from the train, and the railroad company was held responsible for an injury to the party in ejecting him in a reckless and wanton manner, on the ground that he was acting within the general scope of his employment.

In *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, the defendant railroad company was in a controversy with the Santa Fe Railway Company as to the possession of a piece of railroad. The defendant company sent an armed force of several hundred men in its employ, under its vice president or assistant general manager, to drive off the employees of the Santa Fe Railway Company, which was in peaceful possession of the track. The attacking employees were armed with deadly weapons, and in the execution of this demonstration of force and arms some of the employees of the defendant company fired upon the employees of the Santa Fe Company, injuring the plaintiff, Harris. The railroad company was held responsible for this tortious act, on the ground that the servants were acting within the scope of their employment.

In *Haehl v. Wabash R. R. Co.*, 119 Mo. 325, 24 S. W. 737, a servant of the railroad company was employed to keep trespassers off of one of its bridges, and while performing this service he wrongfully shot and killed a trespasser. The company was held liable, on the ground that the act was done by the servant in the scope of his employment. The court states the rule as follows:

"The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the

Bowen v. Illinois Cent. R. Co

servant was actually engaged in and about his business and carrying out his purposes. * * * But if his business is done, or is taking care of itself, and his servant not being engaged in it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he, and he alone, is responsible."

Without multiplying authorities, it is sufficient to say that in these and their congeners the controlling principle, which binds the master to respond, is that, although the injury done by the servant was willful, or wanton, or done in an excessive manner, beyond the instructions or outside of the intendment of the master, nevertheless, being done within the scope of the employment, to which the master has assigned the servant, the master is responsible.

Illustrations of the nonliability of the master, under this rule, are furnished in the following cases:

Candiff et al. v. L., N. O. & T. Ry. Co., 42 La. Ann. 477, 480, 7 South. 601. The defendant's conductor, on discovering that a car had been broken open, believing that it had been done by a certain person, walked up to such person as he was quietly standing at the station and without a word shot him. It was held that, as this wanton act was entirely beyond the scope of any employment or function of the conductor, the company could not be held responsible. The court said:

"No stretch of the doctrine that masters are responsible even for the torts of their servants, when done within the scope of their employment and in the exercise of the functions in which they are employed, can make it cover such an act as this. Admitting that the conductor is charged with the duty of protecting the cars and contents confided to his care, and that acts done in execution of such charge are within the scope of his employment, and admitting that he supposed Candiff had broken into the car, and shot him for that reason, in what manner was such shooting, under such circumstances necessary or conducive to the protection of the property?"

In *C., R. I & P. Ry. Co. v. Smith* (Kan. App.) 63 Pac. 294, a section foreman was in the habit of carrying a gun upon hand-cars, without the knowledge or direction of the employer, used for his own purposes, and through the recklessness of the section foreman the gun was discharged, injuring his assistant. It was held that no recovery could be had against the railway company, on the ground that the employer is not liable for the acts of his employee, if such acts are not authorized by the former or done by the latter in the discharge of some duty.

In *Turley v. Boston & M. R. R. Co. et al.* (N. H.) 47 Atl. 261, the plaintiff testified that he went to the defendant's freight

Bowen v. Illinois Cent. R. Co

yards to look for coal cars, intending to apply for a job of shoveling coal, and was shot by defendant's servant while running away, after the latter had attempted to seize him as a trespasser. The court said:

"As there was no evidence tending to show that the shooting of the plaintiff by Saxton resulted from any fault of the defendants, was directed by them or done by their authority, or was any part of Saxton's work of cleaning and caring for the lamps in the yard, for which he was employed, * * * it cannot be found that the act of Saxton complained of, whether willful or negligent, was the defendants' act, or within the scope of Saxton's employment by them."

In *Farber v. Mo. Pac. Ry. Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, a brakeman forced from a freight train in a rude manner a trespasser who was stealing a ride. The court held that the liability of the railroad company must rest on the law of agency, and not on that of common carrier, as the person was not a passenger; and, as there was not sufficient evidence to show that the brakeman on the freight train was authorized to eject passengers, there was no liability on the part of the railroad company. The court said:

"The liability of the master for the acts of the servant rests now upon the condition whether or not the act of the servant was in the course of his employment."

The most extreme case sought by counsel for plaintiff in error to have this court follow is that of *Daniel v. Petersburg R. R. Co.* (N. C.) 23 S. E. 327. A passenger on the defendant railroad had accomplished his journey, departed from the train, and gone about his private business. He did not apply for his baggage for a day or so afterwards. When he did apply there were charges for its storage, the justness of which charge was not controverted by any evidence. He demurred to the charge, and got into an altercation of words with and applied to this agent of the railroad abusive epithets. After paying the charges and receiving his baggage, he turned to leave the room, and when he reached the door, said employee, smarting under the abusive epithets applied to him, shot and killed the man. His legal representative sued the railroad company for damages and was permitted to recover. The majority of the court, while placing stress on the proposition that the business of the deceased with the baggageman had its origin in the contract for carriage with the railroad company, placed his liability of the railroad company upon the ultimate proposition that at the time and under the circumstances the law laid upon the railroad company the duty of absolute protection against such wanton violence of the servant, while the deceased was in the office for the purpose of transacting such matter of business. The minority opinion filed held that the placing of the responsibility of the master on the ground that the place of the assault was such as to invoke the rule of protection against a willful and wanton assault of the servant,

Bowen v. Illinois Cent. R. Co

as in the case of hotel keepers, proprietors of theatres and steamboats, and the like, was hardly sustainable, and preferred to establish the liability of the railroad company by stretching the relation of carrier and passenger to include the incident at the baggage room. This feat was accomplished by the "argumentum ad judicium." The position has no support in any well-considered case. It stands upon no fundamental postulate upon which the doctrine of respondeat superior has been builded. "If a case in law have no cousin or brother, it is a sure sign it is illegitimate." Bacon. When the intestate reached his destination, left the train and the premises of the company, going about his other affairs, the contract of carriage had been performed, and the relation of carrier and passenger was at an end. It is true that the contract of carriage included the baggage. While in transit, and in the storage room after it reached its destination, until a reasonable time had elapsed for its removal by the passenger, the duty of the carrier as to it was the exercise of a high degree of care for its safe carriage and prompt delivery. If the passenger would continue in force the greater responsibility of the carrier toward him and his baggage, he must apply at the place of delivery for his baggage on his arrival within a reasonable time thereafter. Hutchinson on Carriers, §§ 708-710. The passenger had not called for his baggage within a reasonable time, as storage charges had attached, and the carrier then held it as a warehouseman, a bailee for hire; and its obligation for it was only that of ordinary care, with the implied obligation on the part of the bailor to pay the reasonable storage charges. Hutchinson on Carriers, § 712. While this obligation of the carrier as warehouseman, and the right of the intestate to call for and get his baggage, may technically be said to have had its root in the contract of carriage, yet, as the reason of the rule respecting the extraordinary duties of the carrier toward the passenger while under the jurisdiction and care of the carrier did not exist at the time of the injury, the rule itself ceased to apply. So that the liability of the railroad company for the unanticipated and improbable occurrence, provoked by the misconduct of the deceased and unlawfully resented by the servant, as the majority opinion rightly conceived, could be sustained only on the ground that it was the neglect of a duty on the part of the railroad company in not safeguarding every person who entered its place of business against violence and injury from its employees, no matter whether or not the injury had any legal connection with the manner of performing the duty assigned by the master to the servant.

This extreme rule of the master's liability as to place has hitherto been supposed to apply to carriers, as to their passengers, and to hotels, theatres, steamboats, or like places, as to their guests. It was applied by the Supreme Court of Pennsylvania, in *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732. In that case the plaintiff, a minor, entered the

Bowen v. Illinois Cent. R. Co

tavern of the defendant, where he found one Flanagan, a guest. They became intoxicated on liquor furnished by the proprietor. While the plaintiff was standing on the outside of the bar engaged in conversation with the defendant, the third party pinned a piece of paper to the plaintiff's back and set it on fire, whereby he was badly injured. The proprietor was held liable for the injury, upon the ground that he was cognizant of the prank being played upon his guest, or that, having been guilty of making the third party drunk, or that he came there drunk and he knew that fact, he was bound to see that he did no injury to his customer.

The same rule was applied by the Supreme Court of Minnesota, in *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517, to the instance of a saloon keeper, who gave to his house the quality of an inn, and suffered his guest to be badly burned by vicious persons saturating his feet with alcohol, while he was asleep, setting it on fire. Even there the liability of the proprietor, who was not present at the instant, was sustained upon the ground that he had knowledge of the prank being played upon his customer and took no steps to prevent it.

The liability of a hotel keeper in respect to injuries to his guests underwent thorough discussion by this court in the recent case of *Clancy v. Barker*, 131 Fed. 161. In that case a small boy, about six years of age, was a guest in the defendant's hotel, and wandered out of his room into another room, where a bell boy, or a porter, of the hotel was playing a harmonica, for his own amusement, and the latter, accidentally or willfully, shot the boy with a pistol. The conclusion reached was—

"That when the defendants made their contract to entertain at their hotel the law was, and in our opinion it still is, * * * that their agreement was to exercise reasonable care for his safety, comfort, and entertainment, and that their agreement did not include an insurance of his person against the willful or negligent acts of their servants beyond the course of their employment."

Suppose that A. goes to a mercantile house and makes inquiry about some matter connected with its business, and when that is ended the clerk says to him, "There is a package here for you; please sign a receipt for it," and without more the clerk seizes a revolver and shoots the person to death. Is it possible that the owner of the house shall respond in damages for the injury, the result either of a fit of insanity or personal revenge on the part of the clerk, on the ground, not that it was done within the scope of his employment, but in a place where persons are invited to come and transact business with the house? How is it possible under such condition for any business house to conduct its affairs, dependent upon the employment of clerical assistance, if exposed to such liability, after the merchant has exercised due care in the selection of his clerk, who has worked for him for six months with

St. Louis & S. Ry. Co. v. Lindell Ry. Co

no manifestations of insanity or homicidal tendency? How is he, within the bounds of reason, to safeguard himself against such abnormal outbreak wholly aside from any intendment connected with the work to which the clerk is assigned? To uphold the plaintiff's contention there would have to be written into the law of master and servant a new rule, making every employer an absolute insurer of the safety of every person who comes upon his premises to deal with him on any matter of his special business against any injury inflicted by any employee.

The judgment of the Circuit Court is affirmed.

St. Louis & S. Ry. Co. v. LINDELL RY. Co. et al.

(Supreme Court of Missouri, Division No. 1, June 13, 1905.)

[88 S. W. Rep. 634.]

Municipal Corporations—Streets—Acquisition—Evidence.*—Subsequent to the construction of a railway track a street was laid out as a public highway across the railway right of way. The company did not dedicate the portion of the right of way as a part of the street, nor was it condemned for street purposes, but the city opened and graded the street across the right of way, laid water and sewer pipes thereunder, built sidewalks, etc., and made it as much a part of the street as any other portion thereof. The cost of the improvements was paid by the company. The public used it for a highway for about 18 years. Held, that the street across the company's right of way constituted a public highway.

Same—Street Railroads—Permission to Operate Lines on Streets.†—A city may permit a street railway company to construct and operate a line on a public highway, though it crosses the right of way and tracks of another railway company, Const. art. 12, § 20, reserving to a city the right to permit the operation of street railroads on its streets.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by the St. Louis & Suburban Railway Company against the Lindell Railway Company and others. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

Jefferson Chandler, for appellant.

Boyle, Priest & Lehmann, for respondents.

MARSHALL, J. This is a bill in equity to enjoin the defendants

*For all the preceding authorities in this series on the subject of adverse possession, or title by prescription, against railroad companies, see foot-notes appended to *Roberts v. Sioux City & P. R. Co.* (Neb.), 14 R. R. R. 32, 37 Am. & Eng. R. Cas., N. S., 32.

†See *North Pennsylvania R. Co. v. Inland Traction Co.* (Pa.), 8 R. R. R. 823, 31 Am. & Eng. R. Cas., N. S., 823; *Chicago & C. T. Ry. Co. v. Whiting, Hammond, etc., St. Ry. Co.* (Ind.), 1 Am. & Eng. R. Cas., N. S., 181; note, 1 Am. & Eng. R. Cas., N. S., 189, et seq.; notes appended to *Southern Ry. Co. v. Atlanta Rapid-Transit Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 425; *Northern Cent. R. Co. v. Harrisburg & M. Elec. R. Co.* (Pa.), 6 Am. & Eng. R. Cas., N. S., 151.

St. Louis & S. Ry. Co. v. Lindell Ry. Co

from crossing the tracks of the plaintiff on Hamilton avenue, in the city of St. Louis. Upon final hearing the trial court dissolved the injunction and dismissed the bill, and the plaintiff appealed. This being a proceeding in equity, the facts will be stated in the course of the opinion.

1. The decisive question in this case is, whether Hamilton avenue is a public highway or street in the city of St. Louis. All other questions are subsidiary to this main question, and the solution of the main question carries with it the determination of the greater portion of the contention of counsel for plaintiff in this case.

All the parties hereto are street railway companies in the city of St. Louis, organized under the laws of this state. The plaintiff is a successor or grantee of the old St. Louis & Florissant Railway Company. In 1870, the St. Louis & Florissant Railway Company was a steam railway operated upon a narrow-gauge track. The eastern terminus was at a point almost midway between Grand avenue on the east, Vandeventer on the west, Olive on the south, and Washington avenue on the north. Its western terminus was Florissant, in St. Louis county. Defendant acquired its own right of way, which, at the point here involved, was 30 feet wide. At that time nearly the entire route of said railway lay outside of the city of St. Louis. When the city and county of St. Louis were separated and the limits of the city were extended, the locality involved in this case became a part of the city. At that time, and for many years afterwards, there were no streets in that portion of the city where Hamilton avenue now is, and very few houses of any character or description. About 1875 the owners of the property in the neighborhood of Hamilton avenue subdivided their land and platted it, laying it off into city lots, and making them abut the right of way of the old railroad company. Thereafter the locality rapidly increased in population and importance. At a time, not definitely stated, but which all the evidence shows to have been about 18 years before the institution of this suit, streets were projected running north and south, and crossing the right of way of said railway company. Among them was Hamilton avenue. That street was laid out as a public highway 80 feet wide. It ran north and south, and crossed plaintiff's right of way at right angles. The plaintiff and its predecessors never dedicated by deed or plat the portion of the right of way as a part of Hamilton avenue, nor was the same ever condemned for street purposes. But the city of St. Louis opened and graded the street for its full width across the plaintiff's right of way, laid water pipes thereon beneath the surface, constructed sewers thereunder, built sidewalks, and in all respects made it, so far as appearance and use was concerned, as much a part of the street as any other portion thereof. Electric wires were strung on and over the same, and the city every year sprinkled it, just as it did other public streets. The cost of construction of the street and sidewalk and of the

St. Louis & S. Ry. Co. v. Lindell Ry. Co

sprinkling was assessed against the plaintiff or its predecessors as an abutting owner, and it was paid by the plaintiff and its predecessors. On each side, to the east and west of Hamilton avenue, the plaintiff or its predecessors placed signs on the right of way lying to the east and west of Hamilton avenue, which read: "Private Right of Way. Keep Off the Tracks." During all said period of 18 or 20 years, while the city was so using and treating it as a part of the public highway, Hamilton avenue, including the portion of the plaintiff's 30-foot right of way aforesaid, was opened to public use, and was used generally by citizens for all the purposes for which streets are commonly used. During all that time neither the plaintiff nor its predecessors objected to such use, or claimed that it was not a public highway. On the contrary, the plaintiff and its predecessors paid all of the charges, special taxes, and assessments which were levied against the remaining part of its private right of way, and which were levied by the city for the improvement of Hamilton avenue, including the portion of said 30-foot strip. Originally the track of the plaintiff and its predecessors at said point was a T rail, and plaintiff and its predecessors placed a board crossing thereat, but subsequently the plaintiff removed the T rail from within the limits of what is claimed to be Hamilton avenue, and substituted therefor a girder rail, such as the city ordinance requires shall be used by street railroads. The remaining portions of the plaintiff's track outside of Hamilton avenue, and other streets that are in the same condition as to being public highways, and which portions lie entirely within the limits of the plaintiff's right of way, still have T rails thereon. At no time until shortly before the institution of this suit had the plaintiff or its predecessors claimed or asserted that Hamilton avenue did not include the portion of said 30-foot strip aforesaid. In fact, the plaintiff does not now claim that it is not a public highway for all the uses to which a public highway can be legitimately applied or devoted, except for the construction of a rival street railway thereover.

A public highway may be acquired over property of a private individual by, first, a grant or deed; second, a dedication by plat or deed; and, third, by acts in pais, which in law amount to a dedication. *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. 687. The question in this case is, whether or not the conduct of the plaintiff and its predecessors amount to a dedication by acts in pais, and whether or not the acts of the city constitute an acceptance of the dedication.

The testimony clearly and conclusively shows that the city treated the said portion of said strip as a part of Hamilton avenue for nearly 20 years before this suit was instituted, and that it used it for all the purposes for which a street on, under, and above the surface is commonly used. The plaintiff knew of such use by the city, consented thereto, and paid the assessments for

St. Louis & S. Ry. Co. v. Lindell Ry. Co

the improvement of it as a street in like manner and degree that any other abutting owner pays for the improvement of a street. There is scarcely an act that could be performed by a city with reference to a street that has not been performed by the city with reference to Hamilton avenue, including the strip in controversy. The plaintiff, however, contends that a dedication, whether by deed, grant, plat, or acts in pais, must be, and necessarily is, of the whole right to the property, and that there is, and can be, no dedication in this case, because the plaintiff and its predecessors have always used it as a part of its right of way. This contention is untenable. It was, and is, clearly within the power of a city to lay out, establish, condemn, or acquire a street to cross a right of way of an existing railroad company. The street thus acquired is subject to the paramount right of the existing railroad company, but the two uses of the land for, first, a railroad right of way, and, second, for street purposes, are consistent, compatible, and legal uses. *Railroad v. Chicago*, 166 U. S. 233, 17 Sup. Ct. 581, 41 L. Ed. 979, and *Railroad v. Gordon*, 157 Mo., loc. cit. 77, 57 S. W. 742. This is necessarily true, for otherwise a street could never be projected across a railroad, nor could the city acquire the right of way to have a street cross a railroad, even though it sought to do so by condemnation. Yet section 4 of article 12 of the Constitution expressly reserves the power and right of eminent domain in such cases, and authorizes a proceeding by a city to condemn the right to construct and maintain a street across the right of way of an existing railroad. In fact, the plaintiff concedes the city could have acquired such a right in this case if it had proceeded by condemnation. If it had proceeded by condemnation, it would have acquired only the same right it did acquire by a dedication, by the plaintiff, by acts in pais. Such a dedication did not in any manner impair the plaintiff's right to use the property as a right of way, nor did it amount to a breach of trust by the railroad of its right to the land covered by the right of way.

The plaintiff, however, contends that under the decision of this court in *Railroad v. Totman*, 149 Mo. 657, 51 S. W. 412, title to railroad property can never be acquired by adverse possession under the statutes of this state where such possession began since the taking effect of the Revised Statutes of 1865. That case held that a railroad right of way constituted property devoted to a public use, and therefore the statute of limitations did not run against the railroad and in favor of one who had taken possession of a portion thereof; in other words, that such a possession, under our statutes, does not constitute adverse possession, and can never ripen into a title by limitation. The conclusion reached in that case met with the approval of this division of this court, and nothing has appeared since to cause the court to change the conclusion then announced. But the doctrine there announced in no manner determines the question here involved. The question here is, not whether the city acquired title by limi-

St. Louis & S. Ry. Co. v. Lindell Ry. Co

tation, but whether the plaintiff and its predecessors dedicated the 30-foot strip aforesaid to public use as a street by acts in pais. A dedication by acts in pais may be a perfectly valid dedication although the city has not been in the possession and enjoyment thereof for a period of time necessary to constitute title by limitation. In other words, the two legal propositions depend upon totally different principles. The conclusion is irresistible that the plaintiff and its predecessors dedicated that portion of its 30-foot strip lying within the limits of Hamilton avenue to public use as a street, subject to its right to maintain and operate its railroad thereon. Being dedicated as a public street, it passed at once to the control of the public authorities for all purposes for which any public street may lawfully be used. Elliott on Roads & Streets, p. 133.

2. The next question in this case is, whether, Hamilton avenue being a public street, the city of St. Louis had a right to authorize the defendants to construct and maintain street car tracks on the same. The plaintiff contends that the question of the necessity for the acquisition of a right of way for a railroad is a judicial question, and must be decided by the courts, and is beyond the power of a municipality or of the Legislature to determine. In the abstract, where a railroad company seeks to condemn private property for a railroad right of way, the use to which it is to be devoted is a judicial question. But this rule of law is not determinative in this case, for the defendants are not seeking to condemn plaintiff's property for a right of way, but are claiming a right to run over the streets by virtue of an ordinance duly enacted by the city of St. Louis authorizing them to do so. Given the premise that Hamilton avenue is a public street, it follows that the defendants could not condemn a right of way over the same, for section 20 of article 12 of the Constitution expressly reserves to a city, town, or village the right to say whether or not a street railroad shall be operated on any of its streets. Street railroads constitute a legitimate use of a public street. *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398. Such railroads are simply another method of transporting citizens over the streets, and it has been held that they may not only be legally authorized on the street, but that their presence thereon does not constitute an additional servitude. The infirmity of the plaintiff's whole contention upon this branch of the case consists in its failure to differentiate between an ordinary acquisition of a right of way over private property by means of the exercise of the right of eminent domain, and the construction of a street railroad on an existing street under and by virtue of the authority and permission of the city. Under the facts in judgment here it is impossible to escape the conviction that the plaintiff and its predecessors intended to dedicate the portion of its right of way lying within the limits of Hamilton avenue to public use as a street, subject to its right of way thereover, and, being a public street, it was within the power of the

Worcester v. Worcester Con. St. Ry. Co., etc

city to permit the defendants to construct, maintain, and operate a street railway over the same, and that the plaintiff is not now in a position to claim that such a street railway, even though it be a rival railway, could only be constructed across plaintiff's right of way after a right so to do had been acquired by condemnation.

The judgment of the circuit court is right, and is affirmed. All concur.

CITY OF WORCESTER, *Plff. in Err., v. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.* CITY OF WORCESTER and the Board of Aldermen of the City of Worcester, *Plffs. in Err., v. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.* CITY OF WORCESTER, *Plff. in Err., v. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.*

(Argued January 23, 24, 1905, decided February 20, 1905.)

[25 Sup. Ct. Rep. 327.]

Contracts—Impairment of Obligation—Legislative Power over Municipal Contracts.—A municipal corporation cannot invoke the protection of the contract clause of the Federal Constitution against the abrogation by Mass. Laws 1898, chap. 578, with the consent of the street railway company, of the provisions of a contract between that company and the municipality with reference to paving the streets through which the company was thereby granted the right to extend its tracks, and the substitution which that statute makes of another and different method for paving and repairing such streets.

Two writs of error to the Supreme Judicial Court of the Commonwealth of Massachusetts to review judgments sustaining demurrers to petitions for writs of mandamus to compel a street railway company to repair and maintain the surface of the streets through which its tracks extend. Affirmed. Also

Two writs of error to the Superior Court of the Commonwealth of Massachusetts for the County of Worcester to review judgments sustaining demurrers to bills in equity to compel a street railway company to repair and maintain the surface of the streets through which its tracks extend, which judgments were affirmed on appeal by the Supreme Judicial Court of that State. Affirmed. Also

In error to the Superior Court of the Commonwealth of Massachusetts for the County of Worcester to review a judgment affirmed by the Supreme Judicial Court of that State in favor of defendant in an action on a contract under which a street railway company agreed to pave and repair the streets through which its tracks extended. Affirmed.

See same cases below, 182 Mass. 49, 64 N. E. 581.

Statement by Mr. JUSTICE PECKHAM:

These five cases were brought here by writs of error, sued out

Worcester v. Worcester Con. St. Ry. Co., etc

by the city of Worcester, for the purpose of reviewing the several judgments of the supreme and superior courts of the commonwealth of Massachusetts, respectively, affirming the judgments of the trial courts in favor of the railroad company, the defendant in error. The five cases involve the same questions, and were brought for the purpose of answering any possible objection to the particular mode adopted in any one case for the purpose of obtaining the relief sought by the plaintiff in error. 182 Mass. 49, 64 N. E. 581. The first two cases were petitions for writs of mandamus against the railroad company, which petitions were demurred to, and the demurrers sustained. Of the three other cases, two were suits in equity, and were brought by the city against the railroad company, and were heard upon the bills and demurrers thereto, the court sustaining the demurrers; the fifth case was an action on contract originally brought by the city against the railroad company, in the superior court, and heard upon demurrer to the complaint, which was sustained and judgment ordered for defendant, from which judgment plaintiff appealed to the supreme judicial court of the commonwealth.

The defendant in error is a street railroad corporation, organized and doing business under the laws of the state of Massachusetts, and it owned and operated in the city of Worcester and in numerous outlying cities and towns a street railway system parts of which had previously belonged to other similar corporations, and had been acquired by the consolidated company in 1901, by the purchase of the franchises and properties of such other companies under the general provisions of the street railway laws of the commonwealth. Under the general laws of the commonwealth, as they existed from 1891 to 1893, it was provided that a street railway company might apply to the board of aldermen of a city, or the selectmen of a town, for the location of the tracks of the railway company in the streets of the city or town, and, after hearing, it was provided that the board might grant the petition "under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof." Mass. Pub. Stat. chap. 113. § 7.

The law also provided (§ 21 of above act) that the board of aldermen or the selectmen might, from time to time, "under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted, and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the

Worcester v. Worcester Con. St. Ry. Co , etc

tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof."

Section 32 of the act made it the duty of every street railway company to keep in repair, to the satisfaction of the superintendent of streets, "the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, and if such tracks occupy unpaved streets or roads (the company) shall, in addition, so keep in repair 18 inches on each side of the portion occupied by its tracks," etc.

As the law then stood, the railroad company, on several different occasions, between 1891 and 1893, made applications for and was granted the privilege of extending the location of its tracks. On the 11th day of May, 1891, the defendant in error, upon application, was duly granted an extension of its location for its tracks in certain streets in the city of Worcester, which extension of location was stated in the order or decree of the board of aldermen to be granted "upon the following conditions;" eight different conditions then follow, among which is—

"Second. That block paving shall be laid and 'maintained between the rails of its track, and for a distance of 18 inches outside of said rails, for the entire distance covered by this location.' "

This order or decree was duly accepted in writing by the defendant in error, and its acceptance filed with the clerk of the city of Worcester. Other extensions of locations were applied for and granted during this time, some of which were upon the condition or restriction that the paving should be between the rails and outside thereof to the street curb, and these conditions were accepted and the acceptance duly filed in the city clerk's office.

Subsequently, and in 1898 (chap. 578 of the Massachusetts Laws of that year), provision was made for a somewhat different system of taxation than that which prevailed at the time these several extensions of locations were granted and accepted by the railroad company. It was provided by § 11 of that act as follows:

"Sec. 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads, and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road, or bridge, in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor."

After the passage of this act of 1898 the railroad company consented and conformed to its requirements, and thereafter

Worcester v. Worcester Con. St. Ry. Co., etc

omitted to make the repairs in the streets which had been required of it at the time when its extended locations were granted, during the period from 1891 to 1893. The city thereafter sought by these various actions or proceedings to compel the street railway company to repair and maintain the surface of the streets as provided for by the law in force when the extended locations were given and accepted. During the time that the railroad company had, since the passage of the act of 1898, omitted to make the repairs provided for as a condition for the granting of its application for extended locations, the city had incurred expenses in renewing and repairing various portions of the pavements, because of the omission and refusal of the railroad company to do so, and one of these actions was brought to recover the expenses thus incurred by the city in making such repairs and renewing such pavement.

Messrs. Arthur P. Rugg and John R. Taylor for plaintiff in error.

Messrs. Bentley W. Warren and Clement R. Lamson for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

The defendant in error makes no objection to the form in which the question to be decided comes before us. Whether one or the other action or proceeding is proper and appropriate need not, therefore, be considered.

The contention on the part of the plaintiff in error is that, by virtue of the restrictions or conditions placed by it upon granting the various extensions of locations of the tracks of the railroad company, and by the acceptance of the same by the company, a contract was entered into between the city and the railroad company, which could not be altered without the consent of both parties; and that as the city had never consented to any alteration of the obligation of the railroad company to make the repairs in the streets, as provided for in those restrictions or conditions, the subsequent legislation contained in the act of 1898 impaired the obligation of that contract, and was therefore void, as a violation of the Constitution of the United States.

In the view we take of this subject it may be assumed, for the purpose of argument, that the city of Worcester had power, under the legislation of the state, to grant the right to extend the location of the railroad company's tracks upon the restrictions or conditions, already mentioned. It may also be assumed, but only for the purpose of the argument, that the restrictions or conditions contained in the orders or decrees of the board of aldermen, upon their acceptance by the company, became contracts between the city and the company.

The question then arising is whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company

Worcester v. Worcester Con. St. Ry. Co., etc

with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the commonwealth had that power. A municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the state. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534, 13 L. Ed. 518, 528.

As is stated in *United States v. Baltimore & O. R. Co.*, 17 Wall. 322, 329, 21 L. Ed. 597, 600, a municipal corporation is not only a part of the state, but is a portion of its governmental power. "It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory, as it governs the state at large. It may enlarge or contract its powers, or destroy its existence. As a portion of the state, in the exercise of a limited portion of the powers of the state, its revenues, like those of the state, are not subject to taxation."

In *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521, 522, it was stated by Mr. Justice Field, in delivering the opinion of the court, that—

"A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this, only in another way, when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

In *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552, it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the state, and that the charters under which such corporations are created may be changed, modified, or repealed as the exigencies of the public service or the public welfare may demand; that such corporations were composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the

Worcester v. Worcester Con. St. Ry. Co., etc

legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

It was said in that case that "public duties are required of counties as well as of towns, as a part of the machinery of the state; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text writers upon the subject, and the great weight of judicial authority."

In *Tippecanoe County v. Lucas*, 93 U. S. 108-114, 23 L. Ed. 822-824, the question of the validity of an act of the legislature was presented, and Mr. Justice Field, in delivering the opinion of the court, said:

"Were the transaction one between the state and a private individual, the invalidity of the act would not be a matter of serious doubt. Private property cannot be taken from individuals by the state except for public purposes, and then only upon compensation or by way of taxation; and any enactments to that end would be regarded as an illegitimate and unwarranted exercise of legislative power. . . . But between the state and municipal corporations, such as cities, counties, and towns, the relation is different from that between the state and the individual. Municipal corporations are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature."

In *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699, it was held that, where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the state creating them.

In *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943, 12 Sup. Ct. Rep. 142, it was also held that a municipal corporation was the mere agent of the state in its governmental character, and was in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation. It was also therein held that such a corporation, in respect of its private or proprietary rights and interests, might be entitled to constitutional protection. The Massachusetts courts take the same view of such a corporation. *Browne v. Turner*, 176 Mass. 9, 56 N. E. 969.

Enough cases have been cited to show the nature of a municipal corporation as stated by this court. In general it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, "to constitutional protection." Property which is held by these corporations upon conditions or terms contained in a grant, and for a special use, may not be diverted by the legislature.

Worcester v. Worcester Con. St. Ry. Co., etc

This is asserted in *Tippecanoe County v. Lucas*, 93 U. S. 115, 23 L. Ed. 824, and in *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695, the supreme court of Massachusetts held that cities might have a private ownership of property which could not be wholly controlled by the state government.

It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent. If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare. In *Springfield v. Springfield Street R. Co.*, 182 Mass. 41, 4 R. R. R. 815, 27 Am. & Eng. R. Cas., N. S., 815, 64 N. E. 577, this question was before the supreme judicial court of Massachusetts, and the contention of the city to the same effect as the plaintiff in error contends in this case, was overruled. It was therein held that the city acted in behalf of the public in regard to these extensions of locations, and that the legislature had the right to modify or abrogate the conditions on which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by it. The case at bar was decided at the same time as the *Springfield Case* (182 Mass. 49, 64 N. E. 581), and the proposition that the legislature had the power to free the company from obligations imposed upon it by the conditions in the grant of the extended locations was adhered to, and the *Springfield Case* cited as authority for the same. We concur in that view.

There is no force in the contention that the city of Worcester has a proprietary right in the property of the defendant in error, reserved to it under the original statute incorporating the Worcester Horse Railroad Company. Mass. Laws, 1861, chap. 148. These sections simply give the city of Worcester the right, during the continuance of the charter of the corporation, and after the

Sluder v. St. Louis Transit Co

expiration of ten years from the opening of any part of said road for use, to purchase all its franchises, property, rights, etc. That right is not affected by the legislation in question, even assuming (which we do not for a moment intimate) that the act of 1898 affected the right of the city to make the purchase under the sections above cited.

We see no reason to doubt the validity of the act of 1898, and the judgments of the Supreme Judicial Court and the Superior Court of Massachusetts are, respectively, affirmed.

SLUDER v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, June 1, 1905.)

[88 S. W. Rep. 648.]

Constitutional Law—Delegation of Power—Municipal Corporations.—The granting to a municipal corporation of power to pass all necessary ordinances for the protection of the safety of citizens is not an infringement of the maxim that legislative power may not be delegated.

Same—Police Power—Regulation of Street Railroads.*—Scheme & Charter of St. Louis, art. 10, § 1, gives the municipal assembly power to determine by ordinance all questions arising with reference to regulating or controlling street railroads; and by article 3, § 26, the mayor and assembly have power by ordinance to establish, etc., all streets, and to regulate the use thereof. An ordinance of the city of St. Louis provides that the motorman propelling a street car shall keep a vigilant watch for vehicles, and, on the first appearance of danger therefrom, shall stop the car as soon as possible. Held, that such ordinance is a valid exercise of the city's police power, and an acceptance or agreement of a street railroad company is not necessary to give the ordinance binding force.

Street Railroads—Negligence—Breach of Ordinance.†—A breach of the requirements of the ordinance amounts to negligence, for the results of which a street railroad company is liable to an individual.

Same—Degree of Care Required.—The ordinance is not void on the ground that it exacts a higher degree of diligence and care than the common-law rule of ordinary care.

Same—Imputed Negligence.‡—Where plaintiff contracted with a livery stable keeper for a carriage to convey him to a certain place, and, when the carriage and driver called for plaintiff, he merely told the driver where he was going, and gave no other directions, any negligence of the driver was not imputable to plaintiff on the theory that the relation of master and servant existed.

*As to the power of municipal corporations to regulate the operations of street railways and other railroads in streets, see *Central R. R. of New Jersey v. City of Elizabeth* (N. J.), 11 R. R. R. 473, 34 Am. & Eng. R. Cas., N. S., 473, where all the preceding authorities in this series are collected; *Houston & T. C. Ry. Co. v. Dallas* (Tex.), 14 R. R. R. 498, 37 Am. & Eng. R. Cas., N. S., 498 (ordinance requiring tracks at crossings to be reduced to grade was a valid exercise of police power).

†See foot-notes appended to *Memphis St. Ry. Co. v. Haynes* (Tenn.), 13 R. R. R. 384, 36 Am. & Eng. R. Cas., N. S., 384.

‡For the authorities in this series on the subject of imputed negligence, see foot-note appended to *Hampel v. Detroit, etc., Ry. Co.*

Sluder v. St. Louis Transit Co

Same—Contributory Negligence.—Where plaintiff was being driven in a closed carriage, on a dark winter night, by a driver who was not known to plaintiff as a negligent or reckless driver, and the first knowledge that plaintiff had of danger from a street car was when, looking through the window of the carriage, he saw a car rapidly bearing down on him, he was not guilty of contributory negligence.

Personal Injuries—Damages.—In an action for injuries to a physician, which interfered with his practice, it was proper to permit him to testify as to his earnings for that month in the previous year.

Street Railroads—Collision—Evidence.§—In an action for injuries to one whose vehicle was run down by a street car, it was proper to permit him to testify as to the rate of speed at which the car was running; such testimony not being given as an expert.

Same—Evidence as to Speed.—Where, in an action for injuries received by plaintiff in a collision between his vehicle and defendant's street car, the actual physical facts, not controverted by defendant, tended to show an excessive speed of the car, the admission of plaintiff's testimony as to his opinion as to the speed of the car was no ground for a reversal.

Marshall, J., dissenting in part.

In Banc. Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Greenfield Sluder against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Morton Jourdan, Sears Lehmann, Geo. W. Easley, and Boyle, Priest & Lehmann, for appellant.

Campbell & Thompson, for respondent.

GANTT, J. This is an action for damages for personal injuries caused by the collision of one of defendant's street cars with a livery carriage in which plaintiff was riding, at the crossing of McPherson avenue by Boyle avenue, on which last-named avenue the defendant company owned and operated a double-track street railway, in the city of St. Louis. Plaintiff recovered judgment in the circuit court for \$6,000, and defendant appeals.

The petition, in substance, states that on or about the 27th day of December, 1901, about 7:15 o'clock in the evening of that day, the plaintiff, a physician, was being driven in a hired livery carriage west along McPherson avenue (a street running east and west) at its intersection with Boyle avenue (a street running north and south), in the city of St. Louis, and that the lamps on the said carriage were lighted and burning brightly; that at said time and place, and as such carriage in which plaintiff was riding was crossing defendant's south-bound or western street railway track, one of defendant's cars, propelled by electricity and south bound on said track, with great speed, force, and violence, struck

(Mich.), 14 R. R. R. 732, 37 Am. & Eng. R. Cas., N. S., 732, foot-note appended to *Evensen v. Lexington & B. St. Ry. Co.* (Mass), 14 R. R. R. 159, 37 Am. & Eng. R. Cas., N. S., 159; foot-notes appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1.

§As to what evidence is admissible to show the speed of cars or trains, see foot-notes appended to *Norfolk & W. Ry. Co. v. Briggs.* (Va.), 13 R. R. R. 201, 36 Am. & Eng. R. Cas., N. S., 201.

Sluder v. St. Louis Transit Co

and collided with said carriage, driving plaintiff's right arm into his floating ribs, fracturing the large bone of plaintiff's right forearm, inflicting a body blow on plaintiff's body opposite the solar plexus, rendering plaintiff unconscious, and seriously hurting, bruising, and crushing plaintiff's back and body. "And plaintiff avers that at the time of receiving said injuries there was in force in the city of St. Louis an ordinance known as 'Ordinance 19,991,' approved April 3, 1900, which ordinance defendant, long prior to the happening of the accident complained of, accepted, and agreed to be bound by the terms and provisions thereof; that section 1760 of said ordinance, in substance, provides that all street cars after sunset shall be provided with signal lights; that no car shall be drawn at a greater speed than eight miles per hour, and that the conductor, motorman, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles, either on the track or moving towards it, and, on the first appearance of danger to such vehicle, shall stop the car in the shortest time and space possible. And plaintiff avers that though, at the time of receiving said injuries aforesaid, it was long past sunset and dark, yet defendant had negligently failed to provide said car with signal lights, or to place a headlight on said car; that defendant's servants, in violation of said provision of said ordinance, were running said car southwardly on Boyle avenue towards McPherson, at the time said injuries were inflicted, and immediately prior thereto, at a careless, negligent, and dangerously high rate of speed, to wit, at a rate of speed far in excess of eight miles per hour; that defendant's servants in charge of said car, in violation of the provisions of said ordinance hereinabove referred to, negligently failed to keep a vigilant watch ahead for vehicles moving toward the track upon which said car was running, and negligently failed to stop or to attempt to stop or check the speed of said car in the shortest time and space possible, when they saw, or by the exercise of ordinary care or diligence could have seen, the vehicle in which plaintiff was riding, in a position of danger, in time to have stopped said car before striking said vehicle, or to have so checked its speed as to have avoided said collision; and, for another and further assignment of negligence, plaintiff states that, at the time and place of receiving said injuries aforesaid, defendant's servants in charge of said car negligently failed to sound the gong or to give warning of said car's approach." The answer of the defendant was a general denial and the following defense: "Second. Further answering, defendant says that whatever injuries plaintiff sustained, if any, were caused by his own negligence, in suffering and permitting the driver of said carriage to drive in front of the approaching car, when, by looking, he might have seen, or by listening he might have heard, said car approaching, and have avoided the said accident." The reply was a general denial.

The facts developed in the trial were, in substance, the follow-

Sluder v. St. Louis Transit Co

ing: On the evening of December 27, 1901, the plaintiff was, and for some time prior thereto had been, a practicing physician in St. Louis. On that evening he ordered a carriage from the Palace Livery Company—a livery stable owned by Charles H. Wilcox, in the city. Wilcox sent a two-horse hack or carriage in charge of one of his drivers (Thomas Cavanaugh) to plaintiff's residence, with directions to call for the doctor. When plaintiff got into the carriage he directed the driver to take him to a house on Westminster Place (the third from the corner of Forty-Fourth street), and gave no other orders. The driver drove onto McPherson avenue, which runs east and west, to Boyle avenue, which runs south, beginning at Olive street. The first street south of Olive street crossed by Boyle avenue is Westminster avenue. Boyle avenue is 37 feet wide from curb to curb, and McPherson is 40 feet in width. On Boyle avenue the defendant company has a double-track street railway from Olive street, which crosses both Westminster and McPherson as it goes south. At the northeast corner of Boyle and McPherson there is a brick house facing south on McPherson avenue, and standing back 30 feet from the north line of McPherson, with its west side flush with the building line on the east side of Boyle avenue. On the opposite corner to the west or the northwest corner of Boyle and McPherson was a vacant lot, and on the southwest corner, and fronting on McPherson, was the residence of Mr. Jones. It was a dark, windy night, a little foggy—a dark and cloudy night. The driver of plaintiff's carriage sat upon the top seat, outside, and on the front of the carriage, and was driving west on McPherson avenue, on the north side thereof and about seven or eight feet from the north curbstone, in a slow trot. The lamps on the carriage were lighted. Plaintiff sat on the back seat of the carriage, and on the south side. The testimony of the plaintiff was to the effect that as the carriage neared Boyle avenue a car passed going south, and the driver checked up a little, and went forward in a little dog trot, and as he started across the track he heard the click of the wheels on the rails, and heard the driver slap the horses, and he looked out of the north window of the carriage, and saw a car at about what seemed to him 50 or 60 feet distant. He had hardly seen the car when it struck the carriage, and he received the injuries of which he complains. Cavanaugh, the driver, testified that he was proceeding west on McPherson in a slow trot, on the north side of the street, and when he got within 7 or 8 feet of the east rail of defendant's tracks a car passed south, and then he looked both ways, and saw no car coming, and drove on to cross the tracks, and after he got on the west track he suddenly discovered another car coming south, and only about 10 or 12 feet from him. He tried to get out of its way but it came so fast he couldn't do so, and it struck his carriage—the front part of it. He was thrown from the carriage onto the vestibule of the car, right at the feet of the motor-man. He testified he looked north before attempting to cross,

Sluder v. St. Louis Transit Co

and saw no car. No bell or gong was sounded. The only light on the street car was a single incandescent bulb, with a reflector, at the top of the car. The force of the blow cut the horses loose from the carriage, and they ran west on McPherson avenue. The car drove the carriage across McPherson avenue to a position differently estimated from 20 to 40 feet south of McPherson avenue, and the rear platform of the car, when it stopped, stood over the crossing on the south side of McPherson. Two eyewitnesses testified in behalf of defendant, to wit, young Masterson and the motorman, Middleton. The motorman testified he first discovered the carriage when he was very close to the north line of McPherson avenue; that his car was about 5 or 10 feet from the north crossing when he first saw it. Asked if a carriage was 25 feet from the east line of Boyle avenue, going west, on the north side of McPherson avenue, how far down or from what point on Boyle avenue he could first see that carriage, he answered "About fifteen feet" from the north crossing of McPherson avenue; that is, he couldn't see around the corner further east than that, on account of the building on the corner; that the building was very close to the corner. Asked what there was to prevent him from seeing the carriage at a further distance than five or ten feet from it, he answered he was looking both ways to see if anything was approaching: That he had to look in more directions than one. There was liable to be carriages coming from other directions. He testified his car was running four or five miles an hour. He testified to seeing the boy (Masterson) on a pony about Westminster Place, a block north of McPherson. The boy was a little ahead of his car, riding south in a slow trot. He rang the gong for him near Westminster, or a little south of it. Masterson testified he remembered the incident of the car striking the carriage. He was riding a pony belonging to Watkins, a liveryman, going south on Boyle. He first noticed the car before he got to Westminster Place. He heard it come around the corner from Olive street onto Boyle. He was riding then close to the track, but pulled away from it. The bell did not ring, nor the gong sound, after it passed Westminster. It did ring two or three times between Olive and Westminster. He looked back, and the light on the car was very dim. He could see the light, but it was very dim. The car was gaining speed all the time. It was going at a pretty good gait—about 15 miles an hour. "I was riding as fast as the pony would go." He testified he ran his pony off into McPherson avenue, and, after the collision, caught the two horses that were attached to the carriage, and brought them back; that the car stopped on the south crossing of McPherson and Boyle avenues. Plaintiff testified it looked as if it was going 20 to 25 miles an hour. Mrs. Fenley says it was going very fast, and she noticed no effort to check the speed. Mitchell testified it was going nearly 20 miles an hour. Cavanaugh says about 25 miles an hour. On the other hand, the motorman and conductor placed the speed at 4 miles an hour.

Sluder v. St. Louis Transit Co

The plaintiff (himself a physician) and Dr. Harvey G. Mudd testified to the nature of the injuries received, and their evidence tended to show not only serious injuries, causing much pain and suffering, but a loss of time from his practice, entailing a large pecuniary loss.

The instructions will be noted in the course of the opinion.

1. The first proposition advanced for a reversal of the judgment in this case is that the court erred in not requiring plaintiff to elect upon which assignment of negligence he would proceed to trial.

This contention is based upon the assumption that the petition blends causes of action *ex delicto* with causes of action arising *ex contractu*; and this, in turn, is predicated upon the principal insistence in this case, to wit, that section 1760 of Ordinance 19,971, approved April 3, 1900, and commonly known as the "Vigilant Watch Ordinance," from the fact that it provides that the motorman or other employee propelling a street car in said city shall keep a vigilant watch for all vehicles either on the track or moving towards it, and, on the first appearance of danger to such a vehicle, shall stop said car in the shortest time and space possible, could only be passed under the power of the city to contract, and could not be passed under its police power to protect the lives, limbs, and property of those using its streets in the pursuit of their lawful business, but could only control defendant and render it liable for its violation when it accepted it and agreed to be amenable to it, and hence a suit for its violation would be *ex contractu*, whereas the other acts of negligence were torts, either at common law or by statute or ordinance, and *ex delicto*.

In the solution of this contention, fundamental principles must be invoked. That the people, in the Constitution of the state, or the Legislature, in the exercise of its general legislative power, when not restricted by the federal or state Constitutions, may grant municipal corporations the power to pass all necessary ordinances for the protection of the safety of their citizens and their property, is the settled law of this state, and such a delegation of power is no infringement of the maxim that legislative power cannot be delegated. *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275; 1 Dillon on Munic. Corp. § 308, and cases cited; *State ex rel. v. Francis*, 95 Mo. 49, 8 S. W. 1; *Morrow v. Kansas City* (in banc at this term, not officially reported) 85 S. W. 572; *State ex rel. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 793.

The freeholders' charter of the city of St. Louis, adopted August 22, 1876, has all the force and effect of a legislative charter. *Kansas City v. Oil Co.*, 140 Mo. 468, 41 S. W. 943; *City of St. Louis v. Gleason*, 15 Mo. App. 25; *Id.*, 93 Mo. 33, 8 S. W. 348. By section 1 of article 10 of the scheme and charter of St. Louis, it is provided that the municipal assembly shall have power by ordinance to determine all questions arising with reference to

Sluder v. St. Louis Transit Co

street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating or controlling them after their completion. Under section 26, art. 3, of said charter, "the mayor and assembly shall have power within the city by ordinance not inconsistent with the Constitution or any law of this state or of this charter * * * to establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares; * * * to construct and keep in repair all bridges, streets, sewers and drains and to regulate the use thereof," etc. Elsewhere the charter gives the city power to declare and abate nuisances, and pass ordinances for the general welfare. Thus we find that the people of Missouri, by their organic law, have expressly delegated to the city of St. Louis the power to regulate the use of its streets, and pass all needful ordinances expedient in maintaining the peace, good government, health, and welfare of the city. *State ex rel. v. Murphy*, 130 Mo. 22, 31 S. W. 594, 31 L. R. A. 798; *St. Louis & Meramec Riv. Ry. Co. v. Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300; section 20, art. 12, Const. 1875.

Discussing section 26 of article 3 of the St. Louis charter (2 Rev. St. 1879, p. 1585), in *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 467, 13 Sup. Ct. 990, 37 L. Ed. 810, the Supreme Court of the United States said: "It is given power to own and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word 'regulate' is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used." Judge Dillon, in his *Municipal Corporations*, § 713, says: "Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations may control the mode of propelling cars within their limits; may prohibit steam cars and regulate the rate of speed."

It is not, then, to be questioned that under the comprehensive grant in its charter the city of St. Louis has the police power to regulate the use of its streets by street car companies for the protection of the public which uses them for the paramount purpose for which they are established, to wit, for travel thereon; and, so long as they are streets, the city itself cannot appropriate them even to another public use which would wholly or practically deprive the public of the right to travel thereon. *Lockwood v. Railroad*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; *Knapp & Co. v. Railroad*, 126 Mo. 26, 28 S. W. 627.

Sluder v. St. Louis Transit Co

Looking, then, to the ordinance which requires of street railway companies that their motormen and other servants propelling their cars on the streets keep a vigilant watch for vehicles and persons on their tracks or approaching them, it is too clear for argument that in enacting said ordinance it was exercising its governmental police power under its authority over and to regulate the use of said streets, and not its proprietary right to contract for its municipal advantage as such. That St. Louis and the other cities of this state have the power to regulate the speed of trains running along or across their highways has been asserted by this court on numerous occasions, and this is expressly conceded by defendant both in the briefs of its counsel and in the oral argument. This question was thoroughly examined and so decided in *Jackson v. R. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650. In that case Burgess, J., collates the decisions of this court from an early period down to the promulgation of the opinion in that case, and reference only need be made to that case for them. Counsel earnestly labor to show that there is a distinction between an ordinance regulating the speed of cars in and across the streets, and one requiring the motorman to exercise a vigilant watch for vehicles and pedestrians—especially children—on the track of such street railways, or moving toward it; but it is obvious that both spring from the same power to regulate the use of the streets for the protection of the traveling public, their lives, limbs, and property, and both alike fall within the recognized domain of a police law. In *Blue-dorn v. Ry. Co.*, 108 Mo. 443, 18 S. W. 1104, 32 Am. St. Rep. 615, Judge Black, speaking for this court in banc, said: "Our attention has not been called to any provision of the charter of the city of St. Louis which gives the city power, in terms, to regulate the speed of railway trains; but the charter, among other things, gives the mayor and assembly power to regulate the use of streets; to regulate or prevent the carrying on any business which may be dangerous or detrimental to the public health; to declare, prevent, and abate nuisances on public or private property, and the causes thereof; and to pass all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures." "It is well to bear in mind that laws and ordinances regulating the speed of railroad trains are police regulations, purely." *Grube v. R. R.*, 98 Mo. 331, 11 S. W. 736, 4 L. R. A. 776, 14 Am. St. Rep. 645; *Knobloch v. R. R.*, 31 Minn. 402, 18 N. W. 106; *Railroad v. Deacon*, 63 Ill. 91; *Thorpe v. R. R.*, 27 Va. 140, 62 Am. Dec. 625. Indeed, Judge Redfield says: "We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdiction." 2 Redfield on Railways (5th Ed.) 577, 578.

But it is unnecessary to look for support for a proposition so

Sluder v. St. Louis Transit Co

universally conceded as that ordinances regulating the speed of trains in cities are referable to the police power, and that such regulation is based upon the obvious necessity of compelling those who use powerful and dangerous agencies on the public thoroughfares to be careful that they do not injure others who have an equal right to the use of the highway, and the obvious fact that a train of cars moving slowly can be much more readily stopped, to prevent a collision, than one moving at a rapid speed. On identically the same principle is the ordinance for a vigilant watch based. Since the adoption of electricity and cables as the motive power, the danger to pedestrians and those traveling in vehicles on the streets is greatly multiplied; and it is a wise and salutary provision that requires the motorman in charge of these ponderous and rapidly moving cars to carefully watch that they do not run over pedestrians, old men, women, and children, who have an equal right to the use of the streets, and such an ordinance falls as clearly within the police power as does the speed ordinance. Being, then, the exercise of the police power, the ordinance does not depend upon the acceptance of the street car companies to make it obligatory upon them to obey it, but it is a municipal law enacted by the city in its governmental capacity, of which all who come within its scope are bound to take notice, and it has the full force and effect of law within the limits of the corporation. *Jackson v. Grand Ave.*, 118 Mo. 218, 219, 24 S. W. 192. Being a police power, it was and is not within the power of the city to contract it away, or to bind itself not to exercise it whenever the public good or exigencies require its exercise. This is so universally recognized that it is unnecessary to refer to precedents to establish it.

But, say counsel, even if this be conceded, the power is coupled with a power to prescribe limited punishment by fine, penalty, or imprisonment for disobedience, only, and no civil liability to any third party injured by a violation of the ordinance can result therefrom. This contention finds support in the decisions in *Fath v. R. Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *Byington v. R. Co.*, 147 Mo. 673, 49 S. W. 876; *Murphy v. Lindell Ry. Co.*, 153 Mo. 252, 54 S. W. 442. All the subsequent cases are bottomed upon the *Fath Case*, in which, although unnecessary to the decision of the case, *arguendo* it was held "that it is beyond the power of a municipal corporation by its legislative action directly to create 'a civil duty enforceable at common law,' for this is an exercise of the power of sovereignty belonging alone to the state." In *Jackson v. Ry. Co.*, 157 Mo. 635 et seq., 58 S. W. 32, 80 Am. St. Rep. 650, Burgess, J., reviewed all the authorities upon which the doctrine above announced in the *Fath Case* was bottomed, and showed conclusively that those decisions had reference to that class of cases in which private persons sought to avail themselves of a violation of ordinances which the city had passed for its own protection, and for which the city was primarily liable, such as the ordinances

Sluder v. St. Louis Transit Co

requiring owners to remove ice and snow upon the sidewalks adjoining their premises, and ordinances of a similar character, and pointed out that those cases were different from those founded upon the violations of ordinances enacted under the police power for the protection of lives and property, which all cities in this state have the right to pass as police regulations, and which relate primarily to the duty of those whose conduct they regulate for the benefit of persons traveling on the streets, who have a right to rely upon the observance of such ordinances. The line of demarcation is clearly drawn between the two classes of ordinances in the Jackson Case, and is abundantly sustained by authority in other states and by the text-writers. Thus in 1 Shearman & Redfield on Negligence, § 13, it is said: "The violation of any statutory or valid municipal ordinance established for the benefit of private persons is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence brought by a person belonging to the protected class if the other elements of actionable negligence concur." In *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47, cited with approval by this court in *Bluedorn v. Ry. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615, and *Jackson v. Ry. Co.*, 157 Mo. 636, 58 S. W. 32, 80 Am. St. Rep. 650, the distinction was clearly drawn and emphasized, and the authorities throughout the Union collected and distinguished. The opinion in *Jackson v. Ry.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, however, answers the contention of defendant fully on this point. As to the criticism of the opinion in that case as obiter on this proposition, the contrary is the fact. In that case the learned counsel for defendant, in the second paragraph of their brief, made the point that "the petition did not state a cause of action, because it did not show the existence of a civil duty owed by defendant to deceased, and enforceable against it at common law," and there was no allegation of a contract between defendant and the city to comply with the regulations pleaded. *Jackson v. Ry. Co.*, 157 Mo., loc. cit. 624, 58 S. W. 32, 80 Am. St. Rep. 650. Not only was the point fairly and ably presented, but counsel for defendant were right in assuming that the obiter in the Fath Case was to be followed, and that, if the street car company in St. Louis could not be held amenable to the police regulations of said city, then no reason existed why railroad companies in other cities should not avail themselves of this exemption for violations of like police regulations, unless, forsooth, they had signified their consent to be amenable thereto. So that counsel were not only justified in making the point, but we would have been wanting in respect to counsel, had we not considered the point and decided it.

It is urged also that until the Jackson Case no one had questioned the Fath Case, and that this court had followed the latter case in several decisions. This is true, but we duly considered these decisions, and in our opinion they were not in harmony

Sluder v. St. Louis Transit Co

with an unbroken line of decisions, from *Karle v. Ry. Co.*, 55 Mo. 476, down to *Prewitt v. Railroad Co.*, 134 Mo. 615, 36 S. W. 667, in all of which it had been held that the running of a railroad train through the corporate limits of a city in excess of the speed prescribed by ordinance was negligence per se, and a cause of action resulted to any person injured by such violation of the statute. Vide cases cited in *Jackson v. Ry. Co.*, 157 Mo., loc. cit. 641, 58 S. W. 32, 80 Am. St. Rep. 650. *Jackson v. Ry. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, has received the approval of this court in banc in *Weller v. Ry. Co.*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, and the principle upon which it stands has been reiterated in *Hutchinson v. Ry. Co.*, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710, and *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737, and *Cox v. R. Co. (Mo. Sup.)* 74 S. W. 858; and we see no reason for regarding it longer as an open question in this state.

Fath v. Ry. Co., 105 Mo., loc. cit. 545, 16 S. W. 913, 13 L. R. A. 74, and the subsequent cases of *Byington v. Ry. Co.*, 147 Mo. 673, 49 S. W. 876, *Murphy v. Lindell Ry. Co.*, 153 Mo. 253, 54 S. W. 442, *Sanders v. Southern Electric Ry.*, 147 Mo. 411, 48 S. W. 855, and *Holwerson v. St. Louis & Suburban Ry. Co.*, 157 Mo. 245, 57 S. W. 770, 50 L. R. A. 850, which announce the doctrine that no cause of action can arise to a person injured from the violation of such an ordinance as this, should no longer be followed. Since the promulgation of the opinion in *Jackson v. Ry. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, the St. Louis Court of Appeals have followed it in various cases. *Gebhardt v. Transit Co. (Mo. App.)* 71 S. W. 448; *McLain v. St. L. & S. Ry. Co. (Mo. App.)* 73 S. W. 909; *Moore v. St. Louis Transit Co. (Mo. App.)* 75 S. W. 699; *Sepetowski v. Transit Co. (Mo. App.)* 76 S. W. 693.

There was no misjoinder in uniting the several grounds of negligence in one petition. The failure to keep a vigilant watch out for vehicles was not a cause of action arising out of contract, and it was not necessary to prove the company's acceptance of the ordinance.

This brings us to the next insistence of defendant, to wit, that the ordinance exacts a higher degree of diligence and care than the common-law rule of ordinary care, and imposes a harsher one, and for that reason is not in harmony with the general laws of the state, and hence void. This objection to the ordinance in question was urged by the same learned counsel in the St. Louis Court of Appeals in *Sepetowski v. Transit Company*, 76 S. W. 693, 102 Mo. App. 119, but that court held that, "properly construed, it is but declaratory of the common-law duty of corporations operating street railways in populous cities," and that conclusion is in harmony with the decisions of this court. *Riska v. Union Depot R. Co.*, 180 Mo. 168, 79 S. W. 445. It was said by Judge Sherwood in *Lamb v. Ry. Co.*, 147 Mo., loc. cit. 204, 48 S. W. 659, 51 S. W. 81, that although there was no ordinance

Sluder v. St. Louis Transit Co

of the city of Pleasant Hill regulating the speed of engines, and requiring the ringing of the bells on the engines, and although, in his opinion, the 80 rods statute did not apply in such cities: "But while we say this, at the same time we say that, outside of the statute, and under the principles of the common law, a railroad corporation would not perform its full duty of ordinary care unless those employed on a switching engine engaged in its customary avocation should ring its bell, or, if necessary, take any other precaution adapted to the exigency, which, like the mercury in the thermometer, determines to what degree prudence shall rise in order to reach the mark of ordinary care." The same principle is enunciated in *Holden v. Missouri Ry. Co.*, 177 Mo. 456, 76 S. W. 973, wherein the rule announced in *Hicks v. Railroad*, 64 Mo., loc. cit. 439, that "in running through towns and cities, and over public crossings, they are expected to be more careful than at other places where not so likely to injure persons or property," is approved, as was the rule announced in *Frick v. Railroad*, 75 Mo., loc. cit. 609, to the effect that "a less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at a street crossing or when running longitudinally in a street." Indeed, so apparent is the duty of the driver or motorman in charge of cars moving on the rapid transit lines maintained by street car companies to keep a constant and vigilant lookout for persons and vehicles, that a failure to do so would be regarded as negligence, and a failure to exercise ordinary care, in the absence of an ordinance. Certainly such an ordinance is not out of harmony with anything in the Constitution or laws of this state. But learned counsel urge that, if it does not require more than ordinary care, then there is no excuse for its existence. It is a novel argument against the validity of a statute that it conforms to the laws of the state, and requires the same prudence that the general laws of the state exact—particularly so when the charter of the city commands that its ordinances shall be in harmony with the Constitution and laws of the state. We can see no merit in this contention.

Our conclusion is that this ordinance was the exercise of a police power clearly vested in the city for the protection of the lives and property of its citizens on its streets; that it exacts no more than ordinary care, when the conditions and circumstances to which it is applicable are considered, and that a breach of its requirements is negligence; that the acceptance or agreement of the defendant company was not at all necessary to give said ordinance the binding force of a valid municipal law within the limits of the city.

2. A second insistence is that the eighth instruction given in behalf of plaintiff was erroneous. That instruction is in the words following: "(8) The court instructs the jury that the carriage and horses used by the plaintiff at the time of the accident belonged to a livery stable keeper; and if they further believe from the evidence that the driver of the carriage was an

Sluder v. St. Louis Transit Co

employee of the livery stable keeper, and that the plaintiff hired said carriage, horses, and driver from said livery stable keeper, and exercised no control over the movements of said carriage or the handling of said horses, except to give the driver his destination, then the jury are instructed that the driver was not the servant of the plaintiff, and, although they may find from the evidence that the plaintiff's said injury was contributed to by the negligence or want of ordinary care of said driver, without any co-operation on the part of the plaintiff, yet the jury cannot impute such negligence of said driver to the plaintiff; and if they find that the injury was caused both by the negligence of defendant, as explained in the foregoing instructions, and the negligence of said driver, they will yet nevertheless find for the plaintiff." The objection to this instruction is twofold: First, that the driver, in the circumstances detailed in evidence, was the servant of, and under the control of, plaintiff, and therefore the driver's negligence was plaintiff's contributory negligence; second, that it ignores plaintiff's own personal contributory negligence in failing to look out for his own safety, in permitting the driver to drive into obvious danger.

As to the first, counsel for defendant do not insist upon the doctrine of *Thorogood v. Bryan*, 65 English Common Law Reports (8 M. G. & S.) 114, wherein it was ruled "that a passenger upon the vehicle of a common carrier who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons is so identified with the former as to be chargeable with their negligence in an action against the latter, and therefore only entitled to recover damages from his former carrier." The doctrine of that case was afterwards repudiated by the Court of Appeal in England in the case of *The Bernina*, 12 L. R. Prob. Div. (1887) 58, and other cases, and by this court in *Becke v. Ry. Co.*, 102 Mo. 548 et seq., 13 S. W. 1053, 9 L. R. A. 157, in which *Brace, C. J.*, reviewed all the English and American decisions on this point. The decision in *Becke v. Ry. Co.* has been repeatedly followed by this court. *Dickson v. Ry. Co.*, 104 Mo. 491, 16 S. W. 381; *O'Rourke v. Lindell Ry. Co.*, 142 Mo. 352, 44 S. W. 254. And such has been the uniform ruling of our courts of appeal. *Hunt v. Railroad*, 14 Mo. App. 160; *Keitel v. Railroad*, 28 Mo. App. 657; *Munger v. Sedalia*, 66 Mo. App. 629; *Profit v. Ry. Co.*, 91 Mo. App. 369. The distinction claimed between the *Becke* Case and this is that the driver in this case was subject to the orders of plaintiff, and if plaintiff had the right to control the driver, and failed to exercise it, he is responsible for the driver's act. It is well that we determine at the outset what relation plaintiff and the driver, *Cavanaugh*, bore to each other. We think it is plain that *Dr. Sluder* contracted with *Wilcox*, the owner of the *Palace Livery Stable*, to transport him to the residence of his patient, on *Westminster avenue*, near *Forty-Fourth street*. In the performance of his part of the contract of conveyance, *Wilcox* sent his car-

Sluder v. St. Louis Transit Co

riage and driver. The carriage and horses were in the control of Wilcox, through his agent and driver, all the time it was occupied by plaintiff—just as much so as if Wilcox himself had driven it—and it is a confusion of legal principles to say that under such circumstances the relation of master and servant existed between plaintiff and Wilcox, or that of principal and agent. Nor was such relation created between plaintiff and Cavanaugh, Wilcox's driver. The evidence shows that plaintiff ordered the carriage to take him to the house on Westminster, and, when the driver came, simply told him where he was to go, and gave no other directions, and assumed no control over Cavanaugh as to the management of his team, or the route he was to take. This identical question arose in *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583, and the Supreme Court of that state held the relation of master and servant was not created by a mere contract like this for a conveyance. Said the court: "Whether the hack and driver were hired at a public stand or of a private person could make no difference, nor whether the party furnishing them was engaged in the business of a common carrier of passengers or not. It would not do to say that one who buys a passage from New York to Liverpool sustains the relation of master to the officers and crew and owners of the steamer on which he embarks. No more would it do to say that one who buys conveyance for his own person or his family from place to place within the same city, or to an adjoining city, thereby assumes the relation of master to a servant, or liability for his acts uncommanded and uninterfered with by him." The court then proceeds to show that *Thorogood v. Bryan*, upon which the defendant rested in that case, stood upon "indefensible ground;" citing *Little v. Hackett*, 116 U. S. 366-375, 6 Sup. Ct. 391, 29 L. Ed. 652, and many other cases. In *Railroad Company v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126, it appeared that plaintiff hired a coach and horses, with a driver, from one Merkins, to take his family on a particular journey. In the course of the journey, in crossing a railroad track, the coach was struck by a passing train, and the plaintiff was injured. In his action against the company for damages, it was held that the relation of master and servant did not exist between plaintiff and the driver, and that the negligence of the driver co-operating with that of the persons in charge of the train which caused the accident was not imputable to the plaintiff, as contributory negligence, to bar his action; that while a passenger in a hired coach might by words or conduct at the time so encourage a special act of rashness or careless driving as to commit an act of negligence which would bar a recovery, in order to impute contributory negligence to the passenger it must arise from his own conduct, and the negligence of the driver alone, without some co-operating negligence on his part, could not be imputed to the passenger in virtue of the simple act of hiring. Such is the settled doctrine in England. In *Quarman v. Burnett*, 6 M. & W. 499, the defendants were the owners

Sluder v. St. Louis Transit Co

of a carriage, and were accustomed to hire horses and a coachman of a job mistress for a day or a drive, for which the job mistress charged and received a certain sum. The defendants generally had the same horses, and always the same coachman. As a gratuity they gave the coachman two shillings for each drive, and provided him a livery hat and coat. He had driven the defendants one day, and on his return, after the defendants had alighted, the coachman left the horses and carriage unattended. The horses ran off, and ran against the plaintiff's chaise, threw him out, and injured him and damaged the chaise. Plaintiff sued the owners of the carriage, but it was held the driver was not the servant of the owners of the carriage, but of the job mistress, who alone was liable for his negligence. Without citing further authorities, we think the instruction was correct, in advising the jury that the driver in this case was not the servant of Dr. Sluder, so as to make the latter guilty of the driver's contributory negligence, if any.

We have examined with care the long list of cases cited by defendant to sustain its proposition that the demurrer to the evidence should have been sustained on the ground that, while the driver's negligence is not imputable to plaintiff, yet the plaintiff was guilty of negligence in permitting the driver to go upon the track in the face of obvious danger. Without reviewing each of these cases it must suffice to say that each of them contains some element of express sanction by the injured party of the driver's negligent conduct, or some circumstance showing the plaintiff was in a position to see or know the danger to himself or herself, and made no effort to protect herself. In almost every one of them the plaintiff was driving in an open vehicle with the driver in broad daylight, and in nearly all of them the accident occurred at steam railroad crossings, known to the plaintiff to be notoriously dangerous. In no one of them are the facts such as appear in this case. Dr. Sluder was riding in a close carriage on a dark winter night. There was no evidence that the driver was a negligent or reckless driver, and that such a fact was known to Dr. Sluder. On the contrary, the evidence was that the driver was proceeding in a slow trot until he was about to cross Boyle avenue, when he checked his team, and the first knowledge Dr. Sluder had that they had reached the railroad crossing was the click of the tires on the rails, and then, looking through the carriage window to the north, he discovered a car rapidly bearing down on his carriage, and not over 50 feet distant. Almost instantly it struck the carriage and inflicted his injuries. To say that he was guilty of co-operating negligence in sanctioning the want of care of the driver, if, considering the darkness of the night, the failure of the servants of the company to sound the gong or ring the bell, and the very indifferent light on the car, he was negligent, would be to disregard all the reasons upon which the rule that the negligence of the driver is not to be imputed to the passenger is based. The facts of this case do not bring it

Sluder v. St. Louis Transit Co

within the reasoning of any of the cases which are cited as exceptions to the rule itself. Plaintiff was not outside, with the driver, where he could see and advise the driver as to the crossing. He was not situated so that he could have jumped out of the carriage after discovering his peril on the approach of the car. From the inside of the close carriage he could not even have communicated with the driver, and directed him to stop or to rush his team after he saw the car, or, by the exercise of ordinary care under the conditions then confronting him, could have seen it, in time to have averted his injury. *Lake Shore Co. v. Boyts* (Ind. App.) 45 N. E. 812; *Brickell v. R. R.*, 120 N. Y. 291, 24 N. E. 449, 17 Am. St. Rep. 648. We find no evidence of negligence on the part of the plaintiff which would have justified an instruction driving him to a nonsuit.

As to the instruction 8, it was dealing with one question, to wit, whether the negligence of the driver was imputable to plaintiff, and it was not erroneous; nor was there any error in refusing defendant's instructions which made plaintiff responsible for the driver's negligence. There was no evidence even tending to show any contributory negligence on the part of the plaintiff, and hence it was not error to decline to tender that issue to the jury in any other way than to advise them he was not to be charged with any negligence of the driver, in view of the facts developed on the trial. *East Tenn. R. R. v. Markens*, 88 Ga. 62, 13 S. E. 855, 14 L. R. A. 281.

3. The point is also made that the court erred in permitting plaintiff to testify to his earnings for the corresponding months of the previous year. The evidence on this point is as follows: "Q. What were you earning at that time, doctor? I was earning for the month of December, I think, about \$2,000 to the month. For the months corresponding of the previous year to the time I was disabled, I earned \$3,500." To this counsel for defendant objected. "The Court: Wait a minute, doctor. You have answered the question? Ans. There is no way except by comparing with previous times. Question. Was that an average month? (Objection. No ground stated.) The Court: He can answer. (Exception saved.) That was the best month of the year. December, January, and February always are." It will be observed no objection was made when the question which elicited the answer was asked. No motion was made to strike it out. The only exception saved was to the question, "Was that an average month?" The evidence had previously shown that the doctor was incapacitated to practice his profession 11½ weeks, and we have heard no reason stated why it was not competent for the physician himself to testify what his actual monthly practice averaged him. It was not guesswork, but actual knowledge, to which he was testifying. It was not remote, but the value of his profession to him for the immediate months during which he was disabled, and we agree with him that the best evidence was the actual earnings of the month in which he was injured.

St. Louis Southwestern Ry. Co. v. Royall

4. As to his testimony as to the rate of speed at which the car was running, he was competent to testify to what he saw, not as an expert. His judgment may, under the circumstances, have been of little weight; but the objection to it went to its weight, and not its competency. At all events, in view of the actual physical facts not controverted by defendant, its admission is no ground for a reversal of the judgment. He had testified he was familiar with the speed of trains running 20 or 25 miles an hour, and that, in his judgment, it was running about that fast.

We have considered all the propositions advanced for a reversal of the judgment, and, in our opinion, there was no reversible error committed on the trial, and the judgment is affirmed.

BRACE, C. J., and BURGESS, VALLIANT, FOX, and LAMM, JJ., concur.

ST. LOUIS SOUTHWESTERN RY. CO. v. ROYALL *et al.*

(Supreme Court of Arkansas, May 27, 1905.)

[88 S. W. Rep. 555.]

Public Roads—Establishment—Assessment of Damages—Railroad Right of Way—Establishment of Crossing—Compensation.*—Under Kirby's Dig., § 3001, relative to the opening of public highways, and declaring that viewers shall be appointed to assess the damages sustained by any person through whose premises the road is proposed to be established, and section 6681, declaring that, when any public road shall cross any railroad, the railroad company shall construct the crossing, and also keep it in repair, the railroad company is entitled to no compensation for constructing the crossing or keeping it in repair, but is entitled to damages for the establishment of the road across its right of way.

Appeal from Circuit Court, Clay County, Eastern District; Allen Hughes, Judge.

Petition by B. L. Royall and others for the appointment of viewers to lay out a public road, in which the St. Louis Southwestern Railway Company intervened. From a judgment denying to intervener the relief sought, it appeals. Reversed.

The appellees in 1902 filed a petition in the county court of Clay county, asking the court to appoint viewers to lay out a public road. The viewers were appointed, and afterwards made a report recommending that the road be established. The line of the proposed road crossed the

*Right to require railroad companies to construct and maintain crossings over streets and highways laid out subsequently to the construction of the railroads, see foot-notes appended to *Illinois Cent. R. Co. v. Swalm* (Miss.), 11 R. R. R. 118, 34 Am. & Eng. R. Cas., N. S., 118, where all the preceding authorities are collected.

As to the power to compel railroad companies to construct and maintain crossings so as to subserve the safety of highway travelers, see foot-note appended to *Houston & T. C. Ry. Co. v. City of Dallas* (Tex.), 14 R. R. R. 498, 37 Am. & Eng. R. Cas., N. S., 498, where all the preceding authorities in this series are collected.

St. Louis Southwestern Ry. Co. v. Royall

track of the St. Louis Southwestern Railway Company, and this company filed an intervening petition before the county court, in which it alleged that it would cost not less than \$500 to prepare its track and roadbed so as to make it a safe public crossing, and that it would require \$25 to keep such crossing in repair, and that the right to cross over its track was of the value of \$50; but that the viewers appointed to assess the damages sustained by any person through or across whose premises the road was located had failed and neglected to assess any damages to the intervening company for condemning a crossing over its track and right of way, wherefore it asked the court to set aside the report of the viewers, and to allow the company damages for crossing its right of way. The court ordered the company to be made a party to the proceeding, but held that it was not entitled to any compensation on account of the laying out of the public road across its track, and gave judgment against it. On the appeal to the circuit court the same ruling was made, and the company appealed.

S. H. West and J. C. Hawthorne, for appellant.

RIDDICK, J. (after stating the facts). This is an appeal by a railway company from a judgment of the circuit court holding that under the statute it was not entitled to any compensation on account of the laying out of a public highway across its track. The statute in reference to laying out and opening public highways requires that viewers shall be appointed, who "shall assess and determine the damages sustained by any person through whose premises the said road is proposed to be established mentioning the damages to each tract separately." Kirby's Dig. § 3001. It would seem that under this provision of the law it was the duty of the viewers to assess the damages sustained by the company by reason of the laying out and establishing the roadway across its track, unless the statute permits highways to be established across the right of way and roadbed of the company without compensation for damages. But we find nothing in the statute that gives such authority. The statute provides that, when any public road or highway shall cross any railroad, the railroad company shall construct the crossing, and also keep it in repair. Kirby's Dig. § 6681. Now, this does not say that any public road may be established and opened across a railroad without compensation, but that, when public highways are established across a railroad, the railroad company must construct the crossing and keep it in repair. We think it may well be inferred from the language of this statute that no compensation was intended to be paid the company either for constructing the crossing or for keeping it in repair. When a highway is established across a railroad track in this state, it becomes its duty, under this statute, to construct the crossing and keep it in repair. This is a police regulation, and similar provisions are found in the statutes of other states. As nothing is said in the act about compensating the company for this burden which the law places

St. Louis Southwestern Ry. Co. v. Royall

upon it, we think that none can be implied. It seems plain to us that none was intended, for it is not usual to allow compensation for expense of obeying a police regulation. *Railroad v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. The burden of keeping up the public highways rests upon the citizens and property owners of the state, and it is not unreasonable to require that the railroad company should keep that portion of the highway where it crossed its track in repair. For this reason, we are of the opinion that the circuit court correctly held that the company was entitled to no compensation for constructing the crossing and keeping it in repair.

But the question of establishing the road across the right of way without compensation or without any assessment of the damages therefor is a different matter. Waiving the question of whether it is in the power of the Legislature to compel a railroad company to give a crossing over its right of way without compensation, we, as before stated, find nothing in the statute which authorizes the establishing a public road across a railroad track and right of way without an assessment of damages; and we think damages should be assessed by the viewers, just as the damages to other proprietors of land along the proposed road are assessed. Now, the report of the viewers in this case shows that they made no assessment of damages suffered by the railroad by reason of the public road crossing its track. The public does not seek to deprive the railroad of its right of way. It only seeks to condemn the mere right to cross, which would leave the company free still to use its right of way and track as it had used it before. A right affecting the use of its property by the company to so slight an extent as this country crossing would affect it would not call for any great amount of damages, but, whether large or small, the company had a right to be compensated to that extent. In the case of *Chi., B. & Q. R. Co. v. Chicago*, the facts were that the city of Chicago established a street across the tracks of a railroad in that city. The jury that tried the case assessed the damages at only \$1, but the judgment was sustained both by the Supreme Court of Illinois and the Supreme Court of the United States. *C., B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. As the road in this case was not a street in a city or town, but a country road, if the viewers had passed on the question of damages sustained by the company by reason of the establishing of this public road across its roadbed and right of way, and had found only nominal damages, we might have sustained the finding, but they did not pass on the question at all; and the circuit court, in sustaining the demurrer to the petition of the company, held, in effect, that under the statute the company was not, as a matter of law, entitled to any damages. But as before stated, we are of the opinion that the company had the right to have the question of whether it was damaged, and the amount of such damage, if any, assessed by the viewers. We are therefore of the opinion that the court erred in sustaining the demurrer to the petition of the company.

New York, etc., R. Co. v. Offield

Judgment reversed, with an order that the case be remanded to the county court, with directions that the viewers be required to ascertain and report the amount of damages suffered by the company by reason of the establishing the road, not including therein any damages for constructing the crossing or keeping same in repair.

NEW YORK, N. H. & H. R. Co. v. OFFIELD.

(Supreme Court of Errors of Connecticut, May 12, 1905.)

[60 Atl. Rep. 740.]

Eminent Domain—Condemnation of Stock in Another Railroad—Defenses—Question of Law.—Under Gen. St. 1902, § 697, requiring courts to take judicial notice of the private acts of the state, a defense to an application by a railroad to condemn shares of stock in another railroad that plaintiff already has, under its charter, power to do all that it proposes to do, by means as advantageous to the public as it would have should it take defendant's stock, presents a mere question of law.

Same—Same—Same.—That a railroad has, under its charter, power to do all that it proposes by means as advantageous to the public as it would have, should it acquire stock owned by defendant in another railroad, is no defense to an application by the railroad to condemn such stock.

Improvements—Policy of Railroad—Evidence—Testimony of President.—A railroad president may testify to the intention and policy of the railroad to make certain improvements. It is unnecessary to show a recorded vote of the directors, authorizing the improvements.

Appeal—Review.—On an application by a railroad to condemn stock of another road, an alleged defect in the showing made by plaintiff cannot be considered on appeal when not raised below by demurrer to the application or otherwise.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Application by the New York, New Haven & Hartford Railroad Company to a judge of the superior court for the appointment of appraisers of two shares of stock of the New Haven & Derby Railroad Company, owned by Charles K. Offield. From a judgment granting the relief prayed for, defendant appeals. Affirmed.

See, also, 59 Atl. 510.

Charles K. Bush and Edward H. Rogers, for appellant.

George D. Watrous, Harry G. Day, and Henry H. Townsend, for appellee.

BALDWIN, J. The second defense in the defendant's answer was that the plaintiff already had, under certain amendments to its charter, which were set forth at length, power to do all that it proposed, by means as advantageous to the public as it would have, should it take the defendant's shares of stock. As courts take judicial notice of all the private acts of this state, and as the judge of the superior court, in dealing with this cause, was exer-

New York, etc., R. Co. v. Offield

cising part of the judicial powers of that court, this defense presented a mere question of law, already disposed of in accordance with our advice, and the demurrer to it was properly sustained. Gen. St. 1902, § 697; New Milford Water Co. v. Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

Upon the hearing on the questions of fact raised by the first defense, it appeared that the directors of the plaintiff company had voted to authorize the expenditure of \$275,000, under the supervision of its president, for improving and double-tracking about four miles of the New Haven & Derby Railroad, next west of the intersection of that railroad with the Naugatuck Division of the plaintiff's railroad; that from this intersection to New Haven by way of the Naugatuck Division was over 21 miles, and by way of the New Haven & Derby railroad less than 11 miles; and that the work under the vote was already under contract and in progress. The president of the company testified that it was its intention to make all the improvements described in the application as proposed, in case of the acquisition of the defendant's stock, and that it had begun the work on the tracks lying west of the Naugatuck Division because the necessity for such improvements there was so great that the company could not wait till these two shares had been acquired. There was no error in the admission of this evidence. It was unnecessary to show a recorded vote of the directors authorizing the execution of the entire improvements contemplated in case of the acquisition of the stock in controversy. The president of a railroad corporation may well be sufficiently acquainted with the policy and plans of its directors to testify in regard to them, although they may have never been made the subject of formal action. The rule as to parol evidence of a corporate intent inconsistent with action which has been taken and is on record has no application to parol evidence as to a corporate intent respecting action to be taken in the future. In the case at bar it did not appear that the directors of the plaintiff had passed any vote relating to the subject in hand, except that above mentioned, and no evidence was offered in opposition to the testimony of the president.

The proofs submitted having satisfied the judge of the superior court that the statements in the application were true, he properly found that the acquisition of the defendant's stock will be for the public interest, and proceeded, notwithstanding the objection of the defendant, to appoint appraisers. N. Y., N. H. & H. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510.

It is contended that the plaintiff was bound to show that the board of directors had voted both to make all the improvements described in the application, and to take for that purpose the defendant's stock. The absence of allegations to that effect in the application was not made a ground of demurrer, nor was this point made at any stage of the cause before the judge of the superior court. It is therefore unnecessary to consider it here.

There is no error. The other Judges concurred.

NAUGATUCK R. CO. *v.* CITY OF WATERBURY (two cases).

(Supreme Court of Errors of Connecticut, July 14, 1905.)

[61 Atl. Rep. 474.]

Street Improvements—Assessments—Railroad Lands.*—Land necessary for railroad tracks and buildings and used for railroad purposes solely is not “especially benefited” by the paving of the street in front of it, so as to be subject to assessment therefor under 7 Sp. Laws, p. 217.

Appeal from Superior Court, New Haven County; Silas A. Robinson and Edwin B. Gager, Judges.

Proceedings by the Naugatuck Railroad Company against the city of Waterbury. Judgment for plaintiff. Defendant appeals. Affirmed.

Applications for relief from certain assessments of benefits made by the city of Waterbury against the applicant. The applicant filed in each case four reasons of appeal, to which the city demurred; and the court sustained the demurrer as to the second and fourth reasons of appeal and overruled it as to the first and third. Upon issues joined upon the first and third reasons of appeal the case was tried to a committee, who found the facts and reported them to the court, which accepted the report, and upon the facts found rendered judgment for the applicant, and the city appealed.

Lucien F. Burpee, for appellant.

Lynde Harrison, for appellee.

TORRANCE, C. J. (after stating the facts). These two cases may very properly be considered together. They are both in the nature of appeals to the superior court from assessments of benefits made by the city of Waterbury against the railroad company on account of the paving of certain city streets, and the questions involved in each case are substantially the same. The assessment complained of in the first case (No. 6) was made in July, 1890, on account of the paving of Bank street, and amounted to the sum of \$413.33; while that complained of in the second case (No. 12) was made in August, 1892, on account of the paving of Meadow street, and amounted to the sum of \$1,566.95. No claim is made that the assessments were excessive or unfair. The only claim made is that the lands assessed for benefits in these cases were not, upon the facts apparent or found upon the record, liable to such assessment. Under its charter, at the time the assessments complained of were made, the city had authority to pave Bank and Meadow streets, and to assess upon the persons whose property was “especially benefited thereby a proportionate and

*For the authorities in this series on the question whether railroad property is subject to local assessments, see foot-note appended to *Southern Cal. Ry. Co. v. Workman* (Cal.), 14 R. R. R. 444, 37 Am. & Eng. R. Cas., N. S., 444.

Naugatuck R. Co. v. Waterbury

reasonable part of the expense thereof." 7 Sp. Laws, p. 217. The lands described in both applications, together with all the other railroad property of the applicant, are now in the occupation of its tenant or lessee, the New York, New Haven & Hartford Railroad Company, under a lease for 99 years, and said lessee now operates the railroad of the applicant under said lease. In the superior court, in December, 1903, the applicant withdrew the reasons of appeal theretofore filed in that court by it in both cases, and substituted therefor in each case four other reasons of appeal. The city demurred to each of these reasons of appeal in both cases, and the court sustained the demurrer as to the second and fourth reasons, and overruled it as to the first and third. The substance of the first and third reasons of appeal may be stated as follows: That parcel of land of the applicant assessed for benefits by the city for the paving of Bank street abuts upon that street, and all of it is, and since 1867 has been, used solely and exclusively for railroad purposes, to wit, as and for a passenger station for the railroad of the applicant. The other piece of land of the applicant assessed by the city for benefits on account of the paving of Meadow street abuts upon said street, is contiguous to the first piece, and is now, and since about 1850 has ever been, used solely and exclusively for railroad purposes, to wit, as a freight station and freight grounds, covered by freight tracks and buildings for storing, receiving, and dispatching freight. Said two parcels of land are in continuous use for the purposes aforesaid, and are necessary and adapted for such purposes, and form a necessary part of the railroad property of the applicant and of its lessee. It is not the intention or expectation of the applicant or of its lessee to ever cease from using said parcels of land for railroad purposes. After the demurrer to these two reasons of appeal was overruled, the city denied the allegations contained in them. After this the cases were tried to a committee, who made a report in both cases, which was accepted by the court.

The following statement embodies the substance of the controlling facts found by the committee: In 1887 the applicant leased, with other property, both the Bank street and the Meadow street land by a 99-year lease to the New York, New Haven & Hartford Railroad Company, but, except for said lease, the applicant holds "the unrestricted title" to both of said pieces of land. As to the Bank street land: The applicant's passenger station, erected in 1868, stands upon this land, and all of it not covered by the station is and has been used as an approach to it. "All of said piece is, and since 1868 has been, used exclusively for railroad purposes, and is, and since 1867 has been, necessary for such purposes." It is the intention of the applicant's lessee to erect and occupy a new passenger station at some distance from the present station, and, after occupying such new station, to use its present passenger station and its approaches for freight purposes in connection with its freight station and grounds on the contigu-

Naugatuck R. Co. v. Waterbury

ous Meadow street land, "and to continue the railroad tracks adjoining both of said pieces of land in their present location, and use them in its freight business. Both of said pieces of land are adapted to such uses. From said tracks several side or branch private tracks extend to the numerous factories, business buildings, and coalyards which are in the vicinity." During the past 17 years the applicant's lessee has considered plans for changing the location of said passenger station and the location of the tracks adjoining it and adjoining the freight station on the Meadow street land, and has had maps prepared in connection with the consideration of such plans. None of said plans have been adopted except the plan to establish a new passenger station as aforesaid, "and it is not the intention of the plaintiff or its lessee to adopt any of the said plans; except as aforesaid." As to the Meadow street land: Said piece is now substantially covered by the applicant's freight houses and their platforms. Said houses are conveniently located, and accessible for loading and unloading freight on and from cars and wagons, "and are necessary to the plaintiff's lessee in carrying on its freight business." It is the intention of the plaintiff's lessee to continue to use said piece of land for freight purposes, and to continue the railroad tracks adjoining said land in their present location, and to use them in its freight business. Both of said pieces of land are adapted and marketable for manufacturing and for other business purposes.

Upon these facts the trial court annulled and set aside the assessment proceedings in both cases, and rendered judgment accordingly, and whether it erred in so doing is the principal question in the case. The principles applicable in deciding such a question are fairly well settled by the decisions of our own court hereinafter cited. The power of the city of Waterbury to assess benefits on account of a public improvement is limited to cases where the land of some person is "especially benefited" by the improvement, and the assessment must not materially exceed the benefits conferred, and where no benefit is conferred there can be no valid assessment of benefits. To justify an assessment of the kind here in question, the benefits accruing to the land by the improvement must be direct, immediate, appreciable, and certain, and not contingent, remote, and uncertain. Railroad land abutting upon a street or highway, when the land is necessary for railroad purposes, is used solely and exclusively for such purposes, and is permanently devoted to such uses and purposes, is not so benefited by paving the street in front of said land as to justify an assessment of benefits. *First Eccl. Soc. v. Hartford*, 35 Conn. 66; *Bridgeport v. Railroad Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Railroad Co. v. New Haven*, 42 Conn. 279; *Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687; *Railroad Co. v. New Britain*, 49 Conn. 40. In the cases at bar the land assessed is necessary for railroad tracks and buildings used for railroad purposes solely; is now, and for about half a century has

Guyandotte Valley Ry. Co. v. Buskirk

been, used exclusively for railroad purposes; and it is the purpose and intent of its owners to continue, so far as appears, for all time to devote it exclusively to such uses and purposes. The force of these controlling facts is not essentially modified or weakened by the other facts found by the committee, and we think that upon the principles laid down in the foregoing decisions they justified the trial court in annulling and setting aside the assessments in both cases.

The city complains of the action of the trial court in overruling the demurrer to the first and third reasons of appeal, but, as we think the facts alleged in these reasons were substantially the same as the controlling facts found by the committee, the court did not err in overruling the demurrer.

There is no error. The other Judges concurred.

GUYANDOTTE VALLEY RY. CO. v. BUSKIRK et al.

(Supreme Court of Appeals of West Virginia, March 21, 1905.)

[50 S. E. Rep. 521.]

Eminent Domain—Damages—General Benefits.*—In a condemnation proceeding by a railroad company to take the whole of a lot of land for the purposes of its roadbed and station buildings, the compensation to be allowed the defendant for such land is, ordinarily, its market value at the time of its appropriation, without any deduction for benefits or appreciation in value, general and common to the community in which the land is, shared in by all property along the line of the road, and due to the prospect of its construction.

Same—Same—Market Value.—The market value in such case is the price for which the land could be sold in the market by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, and unaffected by compulsion of any kind.

Same—Same—Same.—Such value is to be determined by the same considerations that enter into a sale between private parties, namely, the availability of the land for all valuable uses to which it is adapted, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

Same—Same—Same.—What is termed the market value of property in the law of eminent domain is not a value fixed by consensus of opinion in the community in which the land is, or among business men or dealers in real estate who are familiar with it, but is a value to be fixed by the jury, upon consideration of all the evidence in the case, including the knowledge of the property which they have acquired by their view of it.

Same—Same—Same—Opinion Evidence.—The opinions of persons residing near the property, and who have known it for a considerable period of time, though not dealers in real estate, nor specially informed as to prices, are admissible evidence on the question of its value.

*As to the measure and elements of damages recoverable in eminent domain proceedings, see foot-note appended to *Louisiana Ry. & Nav. Co. v. Jones* (La.), 14 R. R. R. 684, 37 Am. & Eng. R. Cas., N. S., 684, where all the preceding authorities in this series are collected.

Guyandotte Valley Ry. Co. v. Buskirk

Same—Value of Land—Evidence.—The price paid for the land by the defendant is admissible evidence of its value, provided the purchase was not remote from the appropriation in point of time.

New Trial.—A trial court may, in its discretion, refuse to set aside a verdict and grant a new trial, when the application is based only on the desire of the parties to have another trial.

(Syllabus by the Court.)

Error to Circuit Court, Logan County; E. S. Doolittle, Judge. Condemnation proceedings by the Guyandotte Valley Railway Company against George R. Buskirk and others. Judgment for plaintiffs, and defendants bring error. Reversed.

McComas & Northcott, for plaintiffs in error.

Simms & Enslow and *J. B. Wilkinson*, for defendant in error.

POFFENBARGER, J. Charging error in the rulings of the court as to the admission and rejection of evidence and the giving and refusing of instructions concerning the measure and amount of compensation in a proceeding for the condemnation of real estate for railroad purposes, the defendants complain of a judgment of the circuit court of Logan county awarding them \$3,000 as just and full compensation for two adjoining lots owned by them and wholly taken for the purposes of the applicant's right of way for the road and station buildings. These lots had been purchased by the defendant George R. Buskirk at a judicial sale a few days before the 5th day of May, 1903, for the sum of \$1,825. Pursuant to notice, the petition of the Guyandotte Valley Railway Company for the condemnation of the property was filed, and commissioners appointed, on the 27th day of July, 1903, and the commissioners fixed the amount of the compensation at \$3,500, and returned their report on the 28th day of July, 1903. Thereupon the applicant paid said sum into court and excepted to the report, and, together with the defendants, demanded that the amount of compensation be ascertained by a jury. At the jury trial, which occurred on the 24th day of November, 1903, numerous witnesses were introduced and examined in support of the contentions of both the applicant and the defendants.

Two inconsistent theories respecting the measure of compensation and the methods of applying the standard were presented to the court in the offerings of and objections made to evidence, and in the requests for and objections made to instructions—one by the applicant, and the other by the defendants. That of the applicant was adopted and applied. As all the rulings complained of spring out of this proposition or theory, the application of a few general principles of law will suffice to dispose of all the assignments of error. All the instructions requested by the defendants were refused. They read as follows: “(1) The court instructs the jury that if they find, from all the evidence, facts and circumstances before them in this proceeding, that the land mentioned and described in the notice, application, and commissioners' report herein sought to be taken in this proceeding is within the corporate limits of the town of Aracoma, and at the

Guyandotte Valley Ry. Co. v. Buskirk

time of the proposed taking thereof by the applicant had a market value, then such market value, together with the view of the premises, would be the proper measure of compensation to be allowed by the jury to the defendants for the same. (2) The court further instructs the jury that, in ascertaining what would be a just compensation to the defendants for the land proposed to be taken by the applicant, the Guyandotte Valley Railway Company, as set forth in the notice, application, and commissioners' report in this proceeding, such general and intangible benefits as have accrued to this property in common with all other property in the community where it is situate, by reason of the proposed building by the Guyandotte Valley Railway Company of its road into said community, cannot be deducted from its fair market value, if they find it had such value, at the time same was proposed to be taken by said railway company. (3) The court further instructs the jury that if they find, from all the evidence, facts, and circumstances in this proceeding before them, that the property described in the notice, application, and commissioners' report in this proceeding, proposed to be taken by the Guyandotte Valley Railway Company, had, at the time of the proposed taking thereof by said company, a market value, then it would be improper for them to take into consideration, in ascertaining a just compensation to be paid for said property, the price paid therefor by the defendants George R. Buskirk and U. B. Buskirk." The different theory of the applicant was embodied in two instructions, given over the objection of the defendants, which read as follows: "(1) The court instructs the jury that, in ascertaining what would be a just compensation to the owners for the land taken by the railway company in this proceeding for the uses and purposes of its road, they must ascertain, from all the evidence in this case as well as of their view of the land, the actual value of the land at the time when taken, without reference to any increased or enhanced value to said land and common to other landowners along the line of the road, by reason of the prospective construction of the railway company's road through such land. (2) The court further instructs the jury that, although the owners of the land taken by the railway company in this case are entitled to recover as a just compensation therefor the actual market value of the land at the time it was taken by the railway company, yet, in ascertaining what the actual market value was at the time the land was so taken, the jury cannot include in their verdict any increased or enhanced value to said land common to other landowners along the line of the road, by reason of the prospective construction of the railway company's road through such lands, and, in ascertaining the market value of said land so taken, the jury must take into consideration their view of the land, together with all the facts and circumstances now in evidence in the case."

As the whole of the property is taken by the applicant, leaving no residue to be damaged or benefited, the principles governing

Guyandotte Valley Ry. Co. *v.* Buskirk

the ascertainment of damages, as contradistinguished from the value of the land actually taken, have no application and are not to be considered, except by way of elaboration in the discussion of the rules and principles which govern the ascertainment of the value of land taken, to the end that no inconsistent position may be assumed. Benefits, whether general and common to all property affected by the work of improvement, or peculiar to it, when material, can obviously be considered for but one purpose, namely, deduction from the damages to the property. It would be absurd to say they can be added either to the value of the land taken or to the damages to the residue. The landowner is not entitled to recover for benefits conferred upon him. He cannot assert as the basis of a claim for damages that which is a benefit conferred upon him. They are to be separately considered only for the purpose of deduction from the amount he would otherwise be entitled to recover. Therefore, when benefits are excluded from the consideration of the jury in estimating the damages, it is because the landowner is entitled to them, and not required to give them up by suffering an abatement of their amount from his damages. *Railroad Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Railroad Co. v. McComb*, 60 Me. 290; *Packard v. Railroad Co.*, 54 N. J. Law, 553, 25 Atl. 506; *State v. Miller*, 23 N. J. Law, 383; *Williamson v. Amwell*, 28 N. J. Law, 270; *Swayze v. Railroad Co.*, 36 N. J. Law, 295. Our decisions import that in estimating damages to land not taken the owner is to be charged with all benefits. They say, if the market value of the residue after the taking is equal to or greater than its value before the taking, there is no damage. *Stewart v. Railroad Co.*, 38 W. Va. 438, 18 S. E. 604; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; *Rowe v. Pulp Co.*, 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870; *Board of Education v. Railway Co.*, 44 W. Va. 71, 29 S. E. 503. Literally enforced, this rule would plainly charge the landowners with all benefits, general as well as special and peculiar. Though this proposition is asserted by many courts, it is to be doubted whether it is anything more than a mere rule by which to charge the owner with peculiar benefits. The value immediately before and the value immediately after part of the land is taken, or the improvement made, are compared instantaneously, so that no time is allowed for general appreciation in the value of property in the community between the two points of time taken for the comparison. Upon this theory there would be, in fact, but one point, an instant, within which the work is deemed to have been done and the comparison made, thus necessarily limiting the benefits to those which are merely peculiar and special. The increase from prospective improvement has already entered into the value of the property before the comparison is made. This interpretation of the rule accords with the following views expressed by Chief Justice Shaw in *Parks v. Boston*, 15 Pick. 198: "This proceeding [for acquiring the

Guyandotte Valley Ry. Co. v. Buskirk

title] is not, strictly speaking, an action for damages, but rather a valuation or appraisal of an incumbrance created on the plaintiffs' estate for the use of the public. It is the purchase of a public easement, the consideration of which is settled by such appraisal only because the parties are unable to agree upon it. The true rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment that the purchase is made, when credit is not specially agreed on. And if a 'pie poudre' court could be called on the instant and on the spot, the true rule of justice for the public would be to pay the compensation with one hand while they apply the ax with the other; and this rule is departed from only because some time is necessary by the forms of law to conduct the inquiry. * * * It being quite clear, then, that the award would necessarily have been predicated of the market value of the condemned property at the time of the location—that is, of the filing of the map—there was no basis for speculation." See full discussion of the subject in *Matter of Department of Public Works*, 53 Hun 280, at page 289, 6 N. Y. Supp. 750, at page 753, et seq., and the numerous authorities there cited.

This is merely a suggestion in response to the intimation, conveyed by the instructions given, that the landowner is in no case to have benefits from an improvement without paying for them. Our cases above referred to may not have such effect. Our statute mentions only peculiar benefits as proper matter of deduction. However this may be, there is probably a difference between the rules applicable to land actually taken and land left in the hands of the owner, as regards benefits, whether general or special. Enhancement of value accruing to a residue is a benefit to the landowner; but enhancement in the value of the land taken does him no good. It benefits the railroad company or other condemnor, if anybody. To the landowner there can be no increase of value in it immediately after the taking, for it ceases to be his property. Any antecedent enhancement, in view of the probable construction of the work through the community for which the land is required, is either extinguished by the appropriation, or passes with the property to the appropriator. This is palpably true when the whole of a tract or lot is taken. There is no residuum to which benefits can adhere. Such case presents the direct question whether the defendant or the applicant is to have the increase in value arising from the prospective construction of the proposed improvement. One or the other must take it, or it must be held that there is none, or can be none. To hold that the defendant cannot have the benefit of such increase would conflict, not only with decisions of this court and the early Virginia decisions, but with the great weight of authority as well. *Railroad Co. v. Foreman*, 24 W. Va. 662, expressly holds that advantages of a general character, which may be or are derived in common by the owners of land along the line of improvement, or benefits derived by the country at large,

Guyandotte Valley Ry. Co. v. Buskirk

are not to be excluded from the estimate. This means that they are not to be excluded from the estimate of damages by deducting them from the damages—not to be taken away from the owner. Hence it must mean that, in the sense of not noticing them, they are to be excluded, wholly excluded, from consideration in making up the estimate. That was a proceeding to take a right of way through a tract of land, by which land would be taken and a residue left, affected by the improvement. The same rule was declared in *Railroad Co. v. Tyree*, 7 W. Va. 693. As given in the syllabus of that case it is obscure, but the opinion, at page 699, states it clearly. In *James River, etc., Co. v. Turner*, 9 Leigh, 313, the court inserted the following clear statement in the syllabus: "Held, that the advantages to be derived to the owner of the land condemned for the company's use, from the improvement, to which the charter requires the assessors to have regard, are such advantages as particularly and exclusively affect the particular tract or parcel of land whereof a portion is condemned—not advantages of a general character, which may be derived to the owner in common with the country at large from the improvement. And it seems that if the charter had provided that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large, should be set off against the actual value of the land condemned and the actual damages sustained by the owner, such a provision would have been unconstitutional." The rule thus declared was the conclusion arrived at after very thorough discussion by Judges Parker and Tucker, and has ever since been followed in Virginia. *Muire v. Falconer*, 10 Grat. 12; *Mitchell v. Thornton*, 21 Grat. 178. It is still the law of this state, unless qualified by *Stewart v. Railroad Co.*, 38 W. Va. 438, 18 S. E. 604, *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837, and other late cases, as has been shown by reference to the earlier cases. If such qualification has been made, it is only in respect to deduction of benefits from the damages to the residue, when there is one, and not to any such deduction from the value of land actually taken.

This is apparent from the terms of the universal rule by which the amount of compensation for land taken is determined, namely, the market value at the time of the taking thereof. As to the time at which the land shall be deemed to have been taken, there is great diversity in the decisions. 15 Cyc. 719. But practically all agree on the standard by which the value is to be determined. *Railway Co. v. Vance*, 115 Pa. 325, 8 Atl. 764; *Railroad v. Braham*, 79 Pa. 447; *Low v. Railroad Co.*, 63 N. H. 557, 3 Atl. 739; *Gregg v. Railroad Co.*, 67 N. H. 452, 41 Atl. 271; *Tedens v. Chicago*, 149 Ill. 87, 36 N. E. 1033; *Brown v. Railway Co.*, 125 Ill. 600, 18 N. E. 283; *Canal Co. v. Archer*, 9 Gill & J. 479; *County v. Bridge Co.*, 110 Pa. 54, 20 Atl. 407; *Railway Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; *Railway*

Guyandotte Valley Ry. Co. v. Buskirk

Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Esch v. Railway Co., 72 Wis. 229, 39 N. W. 129; Muller v. Railway Co., 83 Cal. 240, 23 Pac. 265; Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Railway Co. v. Whalen, 11 Neb. 585, 10 N. W. 491; Railway Co. v. Porter, 112 Mo. 361, 20 S. W. 568; Dickenson v. Fitchburg, 13 Gray, 546; Ligare v. Railroad Co., 166 Ill. 249, 46 N. E. 803; Dupuis v. Railway Co., 115 Ill. 97, 3 N. E. 720; Railway Co. v. Swinney, 59 Ind. 100. It must be perfectly manifest that in every case of a projected railroad there is an appreciation in values of real estate all along the proposed line before any condemnation proceedings are instituted, and, since the market value at or near the date of the institution of such proceeding is the measure of compensation, the enhancement due to the prospect of the construction of the railroad must have entered into the market value of the land, and the landowner obtains it, because he takes the market value at that time, not at a date prior to the announcement of the intent to construct the road.

It is unnecessary, however, to rely for this upon mere argument from a rule of practice as a premise. Direct authority of high character for the proposition that the landowner is entitled to general benefits arising from the prospective construction of the work for which the land is appropriated is at hand. In *Kerr v. South Park Com'rs*, 117 U. S. 379, 6 Sup. Ct. 801, 29 L. Ed. 924, the following charge, delivered by the trial court to the jury, was approved: "A number of witnesses testified that the agitation of the park project, the anticipation that the Legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the Legislature, which finally became a law on the ——— day of February, 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto in that vicinity. Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity, or the anticipated growth and prosperity, of the city of Chicago, you should take in account in determining the amount that will fairly compensate the owner." The court also approved the principles announced in *Cook v. South Park Com'rs*, 61 Ill. 115, in the syllabus of which the following is found: "In assessing the damages, the value at the time of the condemnation should be considered; the owner being entitled to the benefit of an advance caused by the prospective establishment of a public park." These were cases in which the whole of the property was taken, just as in this case. In *San Diego, etc., Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, the court refused to apply the rule, because of the peculiar character of the land and the fact that it had no market value, but admitted the soundness of the principle. *Cobb v. Boston*, 112 Mass. 181, holds that such prospective benefits enter into the market value, but that the facts as to what improvements have

Guyandotte Valley Ry. Co. v. Buskirk

been made or are contemplated are not admissible as independent evidence; nor should the jury, in estimating value, treat such enhancement as an independent element of value. They must find the value at the time of the appropriation, considering, for that purpose, all proper evidence thereof, including the prospective construction of the improvement. In *Cobb v. Boston*, Wells, J., said: "The question to be determined in each issue was the market value of the land at the time it was taken by the city. The petitioner, Cobb, was not entitled to the advantages, whether real or speculative, which might result from improvements to be made by the city after taking the land. Neither the fact that such improvements were afterwards made, nor that they were contemplated before the land was actually taken, was competent, as independent evidence, to show what the market value was. So far as the market value was in fact affected by the knowledge of what was to be done, or of what was contemplated, the petitioner, Cobb, was allowed the full benefit of it. His witnesses took it into consideration in making their estimate of value, to which they testified, and were also allowed to state it as a reason for such estimate. This was all he was entitled to." Collateral or concomitant elements of value in the property are not to be separately considered in arriving at its value. In *re Department of Parks*, 53 Hun (N. Y.) 280, 6 N. Y. Supp. 750; *Railway Co. v. Swinney*, 59 Ind. 100.

An inspection of instructions Nos. 1 and 2, given at the instance of the applicant, in the light of the principles just announced, will reveal their incorrectness. They in effect required the jury to scale down, in direct violation of law, the value of the land at the time of its appropriation, by deducting therefrom the amount of such appreciation in value as had accrued by reason of the prospect of the building of the railroad through the town of Aracoma and that section of the country. This error in the instructions is so grave in character as to call for a new trial, though it may not have prejudiced the defendants in point of fact. Whether it did or not it is impossible to say, but an erroneous instruction raises a presumption of injury. These two instructions are objectionable for another reason of less gravity. They misrepresent the status of the matters involved, by assuming that the road is to be constructed through the lands proceeded against. In one view the assumption accords with the truth, but in another it does not. The road will not be constructed through the land as the land of the defendants, as in most cases, but through it as the applicant's land. More accurately stated, however, the fact is that the railroad takes all the land for its purposes, absorbs or consumes the use of it, and does not merely pass through it. Whether for this a new trial would be allowed it is unnecessary to say; but it is deemed expedient to observe, in view of it, that instructions should be clear and free from inconsistency. That the market value of the land in July, 1903, is the amount to which the defendants are en-

Guyandotte Valley Ry. Co. v. Buskirk

titled has not been denied. For the applicant it has been insisted that the market value does not include general enhancement in view of the probable construction of the road. But the defendants seem to think the term "market value" has some peculiar meaning or significance which precludes the introduction of certain kinds of evidence and directs inquiry by the jury to some value other than that which, upon consideration of all the evidence bearing upon the question of value, they think is the actual value of the property. This necessitates an inquiry into the meaning and purpose of the market value rule.

The true import of the terms "market value," "actual cash market value," and "fair cash market value," which are generally regarded as convertible, is partially reflected by the nature of certain other values sometimes sought to be recovered, in view of which these terms were adopted as expressive of the standard or measure of compensation. Efforts have been made to obtain the value of property in view of a particular use to which the owner has devoted it, such as mercantile trade, which cannot be permitted. *San Diego, etc., Co. v. Neale*, 78 Cal. 63, 67, 20 Pac. 372, 3 L. R. A. 83. Thus, in *Esch v. Railway*, 72 Wis. 229, 39 N. W. 129, a charge that the law did not provide for compensating the owner of the lot for losses in his business was approved. In *U. S. v. Honolulu Co.*, 122 Fed. 581, 58 C. C. A. 279, the court said: "The compensation to be made for land taken for public use in the exercise of the right of eminent domain is measured by its market value at the time of the taking, and evidence is inadmissible to show that it has a peculiar and enhanced value to the defendant." See, also, *Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; *Brown v. Railroad Co.*, 125 Ill. 600, 18 N. E. 283; *Shano v. Bridge Co.*, 189 Pa. 245, 42 Atl. 128, 69 Am. St. Rep. 808; *Railroad Co. v. Eaton*, 136 Ill. 9, 26 N. E. 575; *Munkwitz v. Railroad Co.*, 64 Wis. 403, 25 N. W. 438; *Railroad Co. v. Todd*, 39 Neb. 813, 58 N. W. 289; *In re Railroad Co.*, 98 N. Y. 447. It was said in *Re Furman St.*, 17 Wend. 649: "The use to which the owner has applied his property is of no importance, beyond its influence upon the present value. If highly cultivated, it will be worth more than if suffered to run to waste. * * * What price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals the owner may demand any price, however exorbitant, for his property; but when it is taken for public purposes he can only demand its real value. That value cannot depend in any degree on his own will. To allow either his judgment or his fancy in relation to the proper use of the property to influence the question would be to make the estate either more or less valuable, as it might happen to be possessed by one individual or another." Another value which it would be obviously unjust to adopt is the value to the appropriator for the purpose for which it is taken, another special utility value, instead of the value for all purposes to which the

Guyandotte Valley Ry. Co. *v.* Buskirk

property is adapted. If this were permitted, a city, town, county court, school board, or railroad company might be made to pay many times the actual value of a piece of property indispensable to its purposes. Another kind of value guarded against by this rule is the speculative value. *Muller v. Railway Co.*, 83 Cal. 240, 23 Pac. 265.

The rule is founded upon the assumption that all real estate has a market value, and this is practically true, although these values are not so well defined and easily ascertainable as are the market values of wheat, oats, rye, corn, hay, potatoes, bacon, beef, cattle, hogs, lumber, coal, and the numerous commodities found in commerce. Occasionally there is an exception to this rule, owing to the peculiar nature of the property. In a few rare instances courts have said the property involved had no market value. The property of the Monongahela Navigation Company taken by the United States by the proceeding reported in 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, consisting of its locks and dams, franchise, and right to take tolls, seems to have been so regarded and treated, since the value was determined by the use in which the property was employed; but such proceedings bear little analogy to a simple action to condemn a small piece of land. Owing to peculiarity of situation and other circumstances, sales of land may be infrequent and prices of it seldom discussed; but the value must nevertheless be determined by practically the same methods as those employed in settled communities in which sales are frequently made. For this, see *San Diego, etc., Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, in which the court declared that "when there is no current rate of price, and where in consequence the court must arrive at the value from a consideration of the uses to which the property may be put, the enhancement in value by reason of the proposed improvement cannot be considered. Such a value is too remote and speculative."

In view of what has been said on the subject of market value, it is perfectly manifest that the property involved here has a market value. All parties admit that, if offered for sale in the open market, it would bring a price. It had been sold only a short time before the application for its condemnation was made for \$1,825 at a public judicial sale. It clearly has that which falls within the definition of market value, namely, "the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of having it." *Stewart v. Railroad Co.*, 38 W. Va. 438, 18 S. E. 604; *Lewis, Em. Dom.* 478; *Railway Co. v. Vance*, 115 Pa. 325, 8 Atl. 764; *Lawrence v. Boston*, 119 Mass. 126; *Railway Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51. See long list of cases cited in that most excellent new work, "Words and Phrases," vol. 5, p. 4383. It is equally apparent that the market value of this property, at the time it was taken, had not a fixed or readily ascertainable value, such as

Guyandotte Valley Ry. Co. v. Buskirk

many kinds of personal property have, but only a value determinable by the opinion of the jury upon consideration of all the evidence bearing on that question. This is shown by the rules prescribed by the courts for ascertaining the value. In *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, the court held that: "In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties; the inquiry in such cases being, what, from their availability for valuable uses, are they worth in the market? As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." In *Low v. Railroad Co.*, 63 N. H. 557, 3 Atl. 739, the court said: "In assessing the plaintiff's damages, the question was, what was the fair market value of the land at the time when it was taken by the defendants? In determining that question, whatever in its location, surroundings, and appurtenances contributed to the availability of the land for valuable uses was proper evidence to be considered by the jury in estimating its salable character, and ascertaining its market value." To the same general import, see *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *In re Department, etc., Co.*, 53 Hun, 280, 6 N. Y. Supp. 750; *Ligare v. Railroad Co.*, 166 Ill. 263, 46 N. E. 803; *Dupuis v. Railroad Co.*, 115 Ill. 97, 3 N. E. 720; *Brown v. Railway Co.*, 125 Ill. 600, 18 N. E. 283; *Kierman v. Railway Co.*, 123 Ill. 188, 14 N. E. 18. Such latitude is allowed, in seeking the value, that opinion evidence is freely admitted and given a wide range. *Railroad Co. v. Foreman*, 24 W. Va. 662, 674; *Beck v. Railroad Co.*, 148 Pa. 271, 23 Atl. 900, 33 Am. St. Rep. 822; *Cochrane v. Com.*, 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491.

On the question of value the jury may rest the verdict largely upon their own knowledge, derived from a view of the premises. Thus, in *Kierman v. Railway Co.*, 123 Ill. 188, 14 N. E. 18, the court held as follows: "The result of a jury's personal view of the land over which a railroad is sought to be laid is evidence proper to be acted upon by them; and if they believe, from the whole evidence, that they have, from such view, arrived at a more accurate judgment as to the value of the premises sought to be taken, and of the damages, than that shown by the evidence in open court, they may, upon the evidence, rightfully fix the value of the land taken, and the damages, at the amount so approved by their judgment, formed from the personal examination, even though it differed from the amount testified to, and the weight of testimony given by witnesses in open court." Whether this court would be willing to go so far as that it is unnecessary to say, but it could not repudiate the general rule that verdicts in such cases will rarely be set aside, in the absence of error in the rulings of the court. Such verdicts have a peculiar immunity from disturbance, for the very reason that the

Guyandotte Valley Ry. Co. v. Buskirk

amount of compensation is so largely a matter of opinion and judgment on the part of the jury, resting in part upon the opinions of witnesses. All this clearly points to the absence of any resort to a supposed fixed market value, established by consensus of opinion in the community, or otherwise, like the value of commercial articles, for which the jury must inquire, and on which, if found, together with their knowledge of the premises derived from their view of the same, they must base their verdict, disregarding all other evidence.

As each of the three instructions proposed by the defendants contains a direction to the jury to inquire as to whether the property had a market value, and, if so, to rest the verdict on that and their view of the premises, instead of directing them to ascertain the market value of the property, using for that purpose, as evidence, the knowledge acquired by their view, and all other evidence, facts, and circumstances in the case, including any market value it might have by consensus of opinion among those who were familiar with real estate values, as a mere fact in evidence, to be considered with all other evidence, if, indeed, such fact is competent evidence, it being in the nature of hearsay information, I regard them as bad, and as having been properly refused; but a majority of the court are of a different opinion, and think the court erred in refusing to give instructions Nos. 1 and 2. My associates fully concur in my statement of principles applicable to the subject, but differ from me in construing the instructions. They think the instructions, properly interpreted, direct the jury to ascertain, from all the evidence in the case, the value of the property, and do not hamper their action by an inquiry for, and adoption of, a supposed market value, other than that to be fixed by themselves. We are of the unanimous opinion, however, that instruction No. 3, requested by the defendants, was properly refused, because it excludes the purchase price of the property from consideration as evidence. The price paid for the land, if not too remote in time, is admissible evidence in such case. In *re Department, etc., Co.*, 53 Hun, 280, 6 N. Y. Supp. 750. This property was purchased only about three months prior to the commencement of this action.

The rulings on the admission and rejection of evidence need not be noticed in detail, since they are all clearly covered by the principles above stated. One of them related to the purchase price of the property, and has been disposed of. The others may all be grouped under the objection to the competency of witnesses to testify to their opinions as to the value of the property because of lack of knowledge of the supposed market value of the land, although all of them knew the property well. One of them, J. S. Miller, had resided in the little town of 500 inhabitants 23 years, still resided there, had bought the property itself three times, and had lived in the house on it for 22 years. W. A. De Jarnette lived two miles from the town at the time and had previously resided in it for about 30 years. Walter Cary had

Wray v. Knoxville, etc., R. Co

known the property for about 14 years and had resided in the town about the same length of time. C. V. White had resided in the town for nearly 32 years. Bruce Holland lived in the town and had known the property for 5 years. J. Cary Alderson knew the property and had resided in the town for 13 years. Simpson Ellis, a farmer and blacksmith, lived within three miles of the town, and had run his blacksmith shop in it for 10 years, knew the property in question, and had once owned it and resided in the house on it. Nothing but the erroneous assumption of counsel for defendants as to the market value theory could have led them to urge against such witness the objection of incompetency. All the rulings of the court respecting this evidence were correct.

It is urged that the court erred in refusing a new trial on the application of both plaintiff and defendants, without regard to the question of error in the rulings of the court or the verdict. Absence of any authority on the subject necessitates the adoption of a rule, and, in view of the discretion always accorded to trial courts concerning the matter of new trials, we hold that the exercise of such discretion, in refusing to set aside a verdict on the sole ground of a request by both parties for such action, is not an abuse of it, and is, therefore, not reviewable. Such an application is not analogous to one for the setting aside of a consent decree, which partakes largely of the nature of a rescission of an agreement. Here there has been a full trial, in which the parties have agreed to nothing, but have fought each other to the end. If a trial court were bound to grant new trials on such ground, the work of the courts might become greatly increased, to the prejudice of suitors, who, never having had a trial, would be delayed by those who had had, perhaps, several. When the law has given a man one fair trial, it owes him no further duty. Illustrations of this principle are numerous.

For the error noted, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial according to law and the principles herein stated.

WRAY et ux v. KNOXVILLE, L. F. & J. R. Co.

(Supreme Court of Tennessee, Oct. 8, 1904.)

[82 S. W. Rep. 471.]

Eminent Domain—Assessment of Damages and Benefits—Constitution and Statute.—Const. art. 1, § 21, providing that no man's property shall be taken for public use without just compensation, and Shannon's Code, § 1857, providing that, in estimating the damages in condemning lands, the jury shall give the value of the land without deduction, but "incidental benefits" which may result to the owner may be considered in estimating the "incidental damages," each refers to separate items; the incidental damages and benefits being in addition to the compensation provided for in the constitution.

Wray v. Knoxville, etc., R. Co

Same—Incidental Damages and Benefits—Opinion Evidence.—In a proceeding to condemn land, under Shannon's Code, § 1857, the opinion of witnesses on the question of incidental damages and benefits to the property that do not attach to other property by the construction of the road is admissible.

Same—Incidental Damages—Frontage on Another Railroad Right of Way.*—The destruction of a valuable frontage on another railroad right of way forms a proper basis for incidental damages in condemning land for railroad purposes, under Shannon's Code, § 1857.

Same—Evidence—Tax Assessment Blank.—In a proceeding under Shannon's Code, § 1857, to condemn land, an assessment blank for the purposes of taxation, proved by a deputy tax assessor to have been handed to him by the husband of complainant, with the valuation of a number of lots, embracing the lot in controversy, is inadmissible.

Judicial Notice.—The court will take judicial notice that land is never assessed for purposes of taxation at its real cash market value.

Appeal from Circuit Court, Knox County; Joseph W. Sneed, Judge.

Proceeding by the Knoxville, La Follette & Jellico Railroad Company against W. A. Wray and wife. From the judgment, W. A. Wray and wife appeal. Reversed.

John W. Green and Shields, Cates & Mountcastle, for appellants.

Cornick, Wright & Frantz, for appellee.

WILKES, J. This is a proceeding to condemn lands for railroad purposes under the exercise of the power of eminent domain. The case has so far proceeded that the matter now in controversy is the compensation to be paid for the land taken and the damages to the remainder of the two separate lots involved.

The jury returned a gross verdict for the appellants, Wray and wife, for \$1,575, and they have appealed to this court and assigned errors which will all be disposed of in a general way.

The property sought to be appropriated is a part each of two vacant lots in Dameron's addition to Knoxville, fronting each 227 feet on the right of way of the Southern Railway Company, and extending back through parallel lines about 295 feet. The portions sought to be taken adjoin largely the right of way of the Southern Railway Company, and are said to be valuable for manufacturing sites. The rear portions of the lots are represented to be small bluffs, rocky and rough. A creek runs through the lots about half way from front to rear. The strip sought is 30 feet wide, and extends along the front of each lot. This strip of 30 feet cuts off the balance of the lots from the right of way of the Southern Railway Company, and indeed a good portion of the level portions of the lots. The landowners, Wray and wife, propounded the following question to witness Sexton and others in order to arrive at the value of the property taken:

"Suppose that the defendants, Dr. Wray and his wife, wanted

*See preceding case and foot-note.

Wray v. Knoxville, etc., R. Co

to sell and the railroad wanted to buy a strip of land 30 feet wide off said lots, beginning at Baxter avenue and running along the right of way of the Southern Railway Company 237 feet, what would be the reasonable cash market value of that quantity of land taken in that place and in that form, without taking into consideration any damages or benefit that might arise to the balance of the land by reason of said sale?"

The question and the answer were objected to by the railroad company, and the objection sustained, and both were excluded.

This question was repeated, and as often ruled out.

The court ruled that the question should be put in the following manner, and he charged the jury to find upon that basis:

"You are to arrive at the value of the property taken by considering what was the cash market value of the entire property in September, 1903, when it was taken for railroad purposes. After that is found, you are to ascertain what the market value of the remaining portion of the land was after cutting off the right of way, and whatever difference that makes in the actual value of the property taken, and the amount is to be allowed without deduction or being affected in any way by incidental damages or incidental benefits." The court said: "I have to instruct you now about the manner in which you are to do that. It is by considering the cash market value of the property at the time it was taken, just before it was taken, and then what it was worth just after; and the law conclusively presumes that the land taken is worth something, and common sense would also dictate that, because the parts of anything are bound to be worth less than the whole." And again: "The actual value of the land taken shall be arrived at in the manner in which I have told you, but you are to consider the form in which it is taken—the manner in which it is taken; and you do that by considering its market value, both before and after taken, at that place and in that manner in which it is shown by the evidence to have been taken."

This illustrates the different modes by which counsel for the landowner and the court and counsel for railroad proposed to test the question of the real market value of the land. All concede that the landowner is entitled to just compensation for the land actually taken, and, in addition, to the damages to the balance of the land, and that these are separate and distinct items, and must be kept separate and distinct, and neither allowed to affect or influence the amount of the other.

The difference between the counsel for petitioners and the court is the manner in which this cash market value is to be ascertained; counsel for petitioners insisting it must be arrived at from proof of facts and opinions of witnesses as to the value of the land taken, considered in the form and at the place taken, while the court held in substance that the whole tract must be first valued at what it was worth before the railroad touched it and again after the right of way was carved out, and the difference would represent the value of the part taken and appro-

Wray v. Knoxville, etc., R. Co

priated. Both parties agree that incidental benefits and dangers should be excluded in making the estimate. Counsel for the railroad company have cited a large number of cases from other states in which it appears that the rule and manner adopted by the trial judge was approved. We need not consider these cases, but must decide the question under our Constitution and statutes, and in the light of our own adjudications. The provision of our Constitution (article 1, § 21) is that "no man's property shall be taken or applied to public use without the consent of his representatives or without just compensation being made therefor."

The rule laid down by statute is (Shannon's Code, § 1857): "In estimating the damages the jury shall give the value of the land without deduction, but incidental benefits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating the incidental damages." It is evident that compensation for the land actually taken, as well as damages to the remainder of the tract, are here embraced under the general designation of damages. Still they are separate, distinct, independent, substantive things, which must not be confused or considered in connection, except as separate items, making a gross total which is inaptly denominated "damages."

It will be noted that just compensation for property taken is provided for by the Constitution. Incidental benefits and damages are creatures of statute, and are in addition to the compensation provided by the Constitution, and separate from it. *R. R. v. Stovall*, 12 Heisk. 5; *Memphis v. Bolton*, 9 Heisk. 508; *Woodfolk v. R. R. Co.*, 2 Swan, 437.

Keeping this in view, we proceed to consider first the rule to be observed in ascertaining the cash market value of the property to be appropriated as a right of way.

The leading case in this state is that of *Woodfolk v. N. & C. R. R.*, 2 Swan, 422. It was argued by five of the greatest lawyers Tennessee ever produced; Return J. Meigs, Edwin H. Ewing, and Wm. F. Cooper for the plaintiff in error, and Francis C. Fogg and John Trimble for defendants in error. Caruthers, J., delivered the opinion of the court.

The court was duly impressed with the importance of the decision and said: "It now devolves upon this court to settle the law, and indicate the proper rules for this and all other cases of the kind, and there will doubtless be many in the future, as the spirit of public improvement has now taken possession of the minds of the people and guides the public counsel of the state. They should be such as will guard the right of the citizen on the one hand and not improperly impede the cause of public improvement on the other."

After fully presenting the question and forcibly stating it, the court said: "We consider the proper rule to be this: that the fair cash value of the land taken for public use, if the owner was

Wray v. Knoxville, etc., R. Co

willing to sell and the company desired to buy that particular quantity at that place and in that form, would be the measure of compensation. It is not in the nature of a wrongful taking for which damages are to be assessed. Nor is it a claim for any wrong or damages done, but the appropriation of the property is legal and rightful, as much so as if the owner had voluntarily sold it to the company, and the only open question was, what is a fair price for the property? What is its value?" Again: "Incidental advantages and disadvantages, benefits and injuries, are to be left entirely out of view in making this estimate. The owner's unwillingness to sell, or the location of the road on his land or near his home on the one hand, and the necessity the public is under to have the land at the particular place on the other, are to have no influence on the price. The property is to be valued on the same principles and considerations as if both parties had agreed upon the sale and had referred the single question of the intrinsic value of that particular property to the commissioners."

The court proceeds: "Here the constitutional provision ends. The Legislature may make any regulations it thinks right and proper for an account or estimate of incidental loss or damages or injury to the landowner. And against this may be set off the benefits and advantages," etc.

This rule has been approved and followed ever since, and the leading case is cited in *East Tenn. & Va. R. R. v. Love*, 3 Head, 67; *City of Memphis v. Bolton*, 9 Heisk. 509; *R. R. v. Stovall*, 12 Heisk. 5. *Alloway v. Nashville*, 88 Tenn. 513, 13 S. W. 123, 8 L. R. A. 123.

It is the rule approved in *Lewis, Eminent Domain*, § 478; *Cooley's Const. Limitations* (5th Ed.) 699.

In estimating this value all the capabilities of the property and the uses to which it may be applied or for which it is adapted are to be considered, etc. *Lewis on Eminent Domain*, § 478; *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; *McKinney v. Nashville*, 102 Tenn. 132, 52 S. W. 781, 73 Am. St. Rep. 859.

The learned counsel for the railroad and learned trial judge concede the correctness of this view and holding, but differ as to the manner in which this cash value shall be ascertained.

We are of opinion the only way to arrive at this cash market value is to estimate the specific, identical land taken by placing a value upon it. This can only be done by a statement of facts, and by opinions and estimates of parties acquainted with the land and upon such facts, opinions, and estimates of the land must the valuation be based.

By the rule laid down by the learned trial judge the specific land taken is never valued. He directs the witnesses to value the whole tract, including the right of way, and then to value the remainder of the tract, excluding the right of way, and they are never permitted to value the land actually taken, but only to

Wray v. Knoxville, etc., R. Co

infer, by a process of subtracting the value of the remainder from the value of the whole tract, what is the value of the part taken. But the witnesses were not permitted to value the land taken, and this is what the law says they shall do.

Under the rule laid down by the learned trial judge we think it would be practically impossible for the witnesses to keep the matter of compensation separate and distinct and unaffected by the question of incidental benefit and damages, both general and special.

Again, we think there are a large number of cases where witnesses could very truthfully say that cutting off the right of way would not affect the value in the market of the balance of the lot or land, and in that event the landowner would get nothing for the land taken. Other difficulties suggest themselves, but we need go no further than to say that under the rule of the trial judge the right of way is never valued, except inferentially—never estimated in and of itself, but only as a remainder, arising out of two other estimates; one including the right of way, and the other excluding it from the tract as a whole. We think the question put to the witness and denied by the court was correct and should have been answered. Counsel may very well have added to it the caution to the witness to look to the entire property, and to the uses to which it is put and the uses to which it is adapted. This might have been added in the same, or put in an additional question; but the question as put was correct, and should have been allowed to be answered.

On the other hand, the rule outlined by the learned trial judge in passing upon the testimony, and the rule laid down by him in his charge, as to the mode or manner of arriving at the actual cash value of the property taken, is incorrect for the reasons stated.

The second assignment is that the court did not allow witnesses to state that in their opinion the lots were injured by the taking of the right of way at the place and in the form taken. The witness would have replied that the lots were injured \$5 per foot on the railroad front, because they were thus cut off from a frontage on the Southern Railway, and the value of the lots as manufacturing sites was destroyed or impaired. It is true that quite a number of states have held that witnesses cannot give their opinions direct as to the damages caused to lots by reason of the taking of the right of way. But equally as many have held such evidence competent. There is a full resume of authorities in Lewis on Eminent Domain, § 436. It is also true that in *Railroad v. Stovall*, 12 Heisk. 1, this court affirmed the charge of the lower court holding that such opinions were not competent; but in the case of *Woodfolk v. R. R.*, 2 Swan, 437, such opinions were treated as competent. Selden, J., in *Rochester R. R. Co. v. Budlong*, 10 How. Prac. 289, says there is no reason why opinions are not competent as to damages to the same extent and for the same reason they are competent as to value.

Wray v. Knoxville, etc., R. Co

The general rule of evidence is that opinions of witnesses who are not experts are not competent, but there is also a general rule that the opinions of a witness founded upon observation and knowledge are admissible. But the witness should give the facts upon which he bases his opinion. *Norton v. Moore*, 3 Head, 481; *Wisener v. Maupin*, 2 Baxt. 359; *Tompkins v. Wisener*, 1 Sneed, 453; *Kirkpatrick v. Kirkpatrick*, 1 Tenn. Cas. 258. Opinions as to the value of real estate are universally admissible. See authorities in 12 Am. & Eng. Enc. Law (2d Ed.) p. 482, and cases cited.

"Opinion" in such case is synonymous with "estimate," and an estimate of value as well as of damages may be made by one familiar with the facts, who states the facts upon which he bases his estimate. We think the court should have allowed the facts to be shown bearing upon the question of incidental damages and benefits to this property that did not attach to other property by construction of the road, and should also have heard the opinion or estimates of witnesses based on these facts. That there may be incidental benefits that pertain alone to the land affected is stated in a number of cases.

Such benefits may consist in the location of a depot on the land, or in the preservation of the land by the cuts and embankments, and other matters. See *Lewis on Eminent Domain*, § 476. And the incidental damages may consist in the necessity of new fences and walls, the removal of outbuildings, or the danger or inconvenience of getting to them, or to wood or water, and many other things. *Lewis on Em. Domain*, § 496. In this case it is claimed that an incidental damage was the destruction of valuable frontage on the Southern Railway right of way.

We are of opinion the learned trial judge went too far when he said to the jury: "You have a right to pay more regard to one witness than another [so far he was correct, but he continues], and you have a right to disregard them all if you see proper to do so. It is your judgment, in other words, that the law seeks, and the opinions of witnesses are but advisory to the jury in reaching a proper and correct conclusion."

Now, taking this language literally, the jury was instructed that it could disregard all the evidence of witnesses and find a verdict upon their own judgment. It is evident that, if the jury should disregard all the witnesses, they would have nothing but their own knowledge to base a verdict upon. Unlike a jury of view, they are not shown the premises, nor is any one or all of them at liberty to use his personal knowledge of them. Evidently the trial judge meant to say to the jury that they might disregard the opinions of the witnesses, and form their own judgment from the facts stated by the witnesses; but they could not disregard all the witnesses and all their statements, for in that event there could be no legitimate basis for a verdict. The true rule is that the jury should consider the opinions of witnesses, as well as the facts which they state, and give their ver-

Wray v. Knoxville, etc., R. Co

dict upon a fair consideration of not only the opinions, but also the facts on which they are based. Petitioners, Wray and wife, insist that the strip of land sought to be taken is valuable as affording manufacturing sites, and that they are deprived of such sites when the land is taken, and that the remaining portions of the tract are damaged by the fact that the strips, when taken, cut them off from access to the Southern Railroad right of way. Now, if the facts be as contended, that the land taken is valuable because of its location to the Southern Railroad and its adaptability to manufacturing sites, these features may be taken into consideration in estimating the value of the strip taken, upon the theory that the jury may regard the place and form in which the land is taken and use to which it may be put or adapted. It may be also that special damages may be suffered by the fact that the remainder of the lots will be deprived of their access to the Southern Railroad. How all this is we do not attempt to decide, in the condition the case is now in before us. We see no reason why accurate photographs of the premises, illustrating truthfully their location, topography, and situation, should not be shown to the jury, to be by them considered with all the other testimony in the case, but not to the exclusion of other testimony; and certainly the jury would not be permitted to form its judgment by merely looking at photographs of the premises alone.

We are of opinion that the proper plan for arriving at the damages to the remainder of the lots not taken for a right of way is to estimate the special benefits and special damages to them, leaving out of view the general benefits and damages resulting from a construction of the road.

If these special damages to each particular lot exceed the special benefits, the landowner is entitled to such excess, in addition to the value of the right of way taken.

The court allowed a paper purporting to be an assessment blank for purposes of taxation to be introduced over objection. It was proven by Mr. Smith, deputy tax assessor, that this schedule was a paper in his office; that it was handed to him by Dr. Wray, the husband of the complainant Mrs. Wray; and that it had upon it a valuation of a number of lots, embracing this one at \$2,300, and purported to be signed by Mrs. Wray. Mr. Smith, the custodian, could not prove the signatures of Mrs. Wray, nor was it proven by any one else.

We think the admission as evidence of this schedule was error. The signature is not proven. The separate value of this particular lot is not shown. The law does not require an owner to value his real estate, but merely to describe it for purposes of assessment for taxation. The valuation, if made of the lot by the petitioner, Mrs. Wray, was for a wholly different purpose from the present one. This court knows judicially and as a part of the financial history of the state that land is never assessed for purposes of taxation at its real cash market value, though that

Illinois, etc., Ry. Co. v. Easterbrook

may be the law, but only in comparison with other lands around it, and, if petitioner valued it, we would presume she placed such comparative value, instead of the real market value, upon it.

It is said in Lewis on Eminent Domain, § 448, that the assessment of property for taxation being made for other purposes, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings. See cases cited.

We think that admission of the schedule was improper.

For the errors indicated, the judgment of the court below is reversed, and cause remanded, and the railroad will pay the costs of appeal.

ILLINOIS, I. & M. RY. CO. v. EASTERBROOK et al.

(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 1116.]

Eminent Domain—Measure of Damages—Land Not Taken—Instruction.—Where, in a proceeding to condemn land for a railroad right of way, defendants denied injury to land not taken, and there was evidence to support such denial, an instruction that the jury should allow full compensation for the land taken, and for such injury to the remainder of the land belonging to defendants as they might believe they were entitled to, was objectionable, as assuming that there was damage to the land not taken.

Same—Same—Same.*—In an action for damages to land not taken for a railroad right of way, the measure of damages is the difference in the market value of the land before and after the construction of the railroad.

Same—Same—Same—Instruction—Curing Error.—An erroneous instruction in a railroad right of way condemnation proceeding that the jury should award compensation for all injury to the remainder of their lands as the jury might believe from the evidence, or from their own observation, would actually affect their value for use if retained by the defendants, or would affect the market value if defendants should choose to sell the lands, was not cured by other instructions limiting the recovery to the difference in value of the land not taken before and after the construction of the road.

Same—Instruction.—In a proceeding to condemn land for a railroad right of way, it was improper to call the jury's attention to the fact that the land was being taken against the will of the owners.

Appeal from De Kalb County Court; Wm. L. Pond, Judge.

Condemnation proceedings by the Illinois, Iowa & Minnesota Railway Company against Alvin Easterbrook and others. From a judgment assessing defendants' damages, complainant appeals. Reversed.

This was a condemnation proceeding brought by the Illinois, Iowa & Minnesota Railway Company, appellant, in the county court of De Kalb county, on March 7, 1904, to condemn a strip of land 100 feet in width through two tracts of land in said

*See preceding case and foot-note.

Illinois, etc., Ry. Co. v. Easterbrook

county; one of said tracts containing 160 acres, and belonging to appellees Alvin, James, and Wilson Easterbrook, and the other containing 40 acres, and owned by appellee Priscilla Easterbrook. The right of way passes diagonally across the northeast corner of the 160-acre tract, leaving a piece in said corner, containing 13.92 acres, separated from the remainder by the right of way. The land actually taken in this tract contains 3.832 acres. The right of way crosses the southwest corner of the 40-acre tract, cutting off one-tenth of an acre in that corner. The land actually taken from this tract for the right of way contains .612 of an acre. The jury awarded to the owners of the 160-acre tract \$421.52 as compensation for the lands actually taken, and to Priscilla Eastbrook \$61.20 for the strip taken as right of way through the 40-acre tract. Appellees' witnesses fixed the damages to the remainder of the 160-acre tract not taken at amounts between \$1,900 and \$3,000, and the damages to the 40-acre tract outside the right of way at \$80 to \$400, while the witnesses for appellant testified that there would be no damage to the land not taken in either of the tracts; a number of them testifying that the land would be benefited. The jury awarded \$1,200 as damages for that part of the 160-acre tract not taken, and \$200 as damages to that portion of the 40-acre tract not taken. The court rendered judgment for the amounts above specified as found by the verdict of the jury, and the railroad company appealed to this court. Appellant urges that the amounts allowed for damages to land not taken were excessive, and that the court erred in excluding evidence offered by the petitioner, in giving to the jury appellees' instructions numbered 1, 2, 4, 5, 7, 8, 9, 10, 13, and 14, and in refusing to sustain a motion made by the appellant to tax the fees of appellees' witnesses, in excess of eight, against appellees.

D. J. Carnes, A. W. Fisk, and Murphy & Alschuler, for appellant.

Cliffe & Cliffe (John M. Raymond, of counsel), for appellees.

SCOTT, J. (after stating the facts). It is assigned as error that the verdict under consideration was excessive in amount. Appellant's contention below and now is that there was no damage to the lands not taken, and its witnesses so testified. A greater number of witnesses, testifying on the part of appellees, stated that the lands not taken would be damaged, and fixed the damages at varying amounts. The allowance for damages to lands not taken, fixed by the verdict, is less than the average of the estimates of appellees' witnesses. Appellant bases its contention principally upon its assertion that its witnesses were better qualified than those of appellees. We have carefully examined the evidence, and would not be disposed to interfere with the judgment, had the jury been correctly instructed.

The first instruction given on the part of appellees is as follows: "The court instructs the jury that they alone are required

Illinois, etc., Ry. Co. v. Easterbrook

to determine the amount of the compensation which shall be awarded to the respondents in this case for the actual value of the land taken, and for the injury and damage done to the residue of the farms or lands of each by the use of that part which shall be taken from each for the location and operation of a railroad. The jury must estimate and ascertain from the evidence, as well as from their own observation, judgment, and experience, what are the usual and natural effects of a railroad upon the adjoining lands. And the damages and injury to each of the defendants is the sum of the actual value of the land taken from them, respectively, and the injury which the location and use of the railroad through the several farms or tracts may cause the remainder; and the jury must report such full compensation to the respondents as will make them whole for the lands taken, respectively, and for all such injury and damage to the remainder of their lands or farms, respectively, as the jury may believe from the evidence, or from your own observation, judgment, and experience, actually affect the value of said farms for use if retained by the defendants, or which affect the market value thereof if said defendants, or either of them, shall choose to sell said lands." The objections to this instruction are twofold: First, it assumes there was damage to the land not taken; second, by the last clause of the instruction the jury are told that damage to the land not taken may be estimated by the injury to the land for use if retained by the defendants, while the true measure is the diminution, if any, in the market value of the land not taken, by reason of the construction and operation of the road. We think both of these objections are well taken. Appellant was insisting vigorously that the lands not taken were not damaged at all, and this instruction assumes that they were damaged. That is a question the jury should have been permitted to determine for themselves, without any intimation from the court that their verdict should include compensation for such damages. As to the second objection, the law is that, if lands not taken will be depreciated in value by the construction and operation of a railroad, the measure of damages is the difference in their market value before and after the construction of the road. *Illinois Central Railroad Co. v. Turner*, 194 Ill. 575, 62 N. E. 798, and cases there cited. It does not meet the difficulty to say that the measure of damages was correctly given to the jury in other instructions. By this instruction they were authorized to apply an improper measure. They could not tell which instruction to follow. This is not an instance where an element lacking in one instruction is supplied by another, so that the two, when read together, state the law correctly.

Appellees' eighth instruction improperly called the attention of the jury to the fact that their lands were being taken against their will. This was calculated to arouse the prejudice of the jury against the petitioner. The duty of the jury is confined to fixing the damages. Whether or not the owner is willing that the lands

Chicago, etc., R. Co. v. Rottgering

should be taken does not concern the jury. To call their attention, by an instruction, to the fact that he objects and is helpless, is apt to excite their sympathy for him, and lead them to return a verdict in a larger amount than is warranted by an impartial consideration of the evidence.

The other errors assigned are without merit. The judgment of the county court will be reversed and the cause remanded.

Reversed and remanded.

CHICAGO, ST. L. & N. O. R. Co. v. ROTTGERING et al.

(Court of Appeals of Kentucky, Dec. 7, 1904.)

[83 S. W. Rep. 584.]

Eminent Domain—Excessive Verdict.—In a proceeding to condemn land for a railroad right of way, evidence held insufficient to show that the damages awarded were so excessive as to indicate passion and prejudice on the part of the jury.

Same—Special Damages—Proximity to City.—Where defendants' land, sought to be condemned for a railroad right of way, was only a quarter of a mile from the limits of a thriving city, and town lots adjoining had been laid off and were in the market for building purposes, it was competent for defendants to prove the adaptability of their land for such use, as well as for gardening or farming purposes, on the issue of damages.

Same—Value of Land—Evidence.—Evidence of the price at which other lands near the lands of defendants sought to be condemned for a railroad right of way sold was admissible as bearing on the value of defendants' land.

Same—Direct Damages—Deductions—Benefits.*—In condemnation proceedings the court charged that defendants should be allowed as direct damages the fair value of the land taken, considering it in relation to the entire tract, and such other direct damages as directly resulted to the remainder of the tract, and improvements, if any, not exceeding in all the difference between the actual value of the land immediately before and its actual value immediately after the taking, and authorized the jury to find for defendants such incidental damages as resulted to the remainder of their land, by the building and operating the railroad in a prudent manner, less whatever sum was the value of the advantage accruing from the building of the road, etc. Held that, as benefits arising from the building or operation of the road could not be deducted from the direct damages sustained by the taking of the land, the charge was proper.

Same—Burden of Proof.—Ky. St. 1903, § 838, provides that, if no exceptions are taken by either party to the report of commissioners in condemnation proceedings, the court shall confirm the report as against the owners not excepting, and Civ. Code Prac. § 526, provides that the burden of proof lies on the party who would be defeated if no evidence were given on either side. Held, that where, in condemnation proceedings, the only questions of fact were tried by the jury, and such questions were raised by exceptions filed by defendants to the report of the commissioners, the burden of proof was on defendants.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

*See preceding case and foot-note.

Chicago, etc., R. Co. v. Rottgering

Condemnation proceedings by the Chicago, St. Louis & New Orleans Railroad Company against H. W. Rottgering and others. From a judgment of the circuit court fixing defendants' damages, plaintiff appeals. Affirmed.

Wheeler & Hughes, J. M. Dickinson, and Pirtle & Trabue, for appellant.

Bloomfield & Crice, for appellees.

SETTLE, J. By petition filed in the McCracken county court as provided by section 835, Ky. St. 1903, appellant instituted proceedings to condemn, and thereby acquire for the purpose of constructing and operating a railroad thereon, a strip of ground 100 feet in width through appellees' land. Upon appellant's application commissioners were appointed by the county court to assess the damages that would result to appellees by the taking of their land and the construction and operation of the railroad. Soon thereafter the commissioners filed their report, in which the value of the land taken was fixed at \$300, and the damages to the remainder of the tract at \$1,200. Process was then issued against the appellees to show cause why the report should not be confirmed, in response to which they filed answer to the petition, and exceptions to the report of the commissioners, in which complaint was made of the smallness of damages allowed, and averring that they were grossly inadequate. Thereupon a jury was summoned as provided by section 839 of the statutes, to try the questions of fact raised by the exceptions. The trial which followed resulted in a verdict in favor of appellees for \$3,000, and judgment was duly entered condemning the strip of land for use of appellant's road, and directing that it be given possession thereof upon the payment by it to appellees of the amount of damages awarded by the jury. Both parties appealed from this judgment to the circuit court, and upon a trial before a jury in that court a verdict was returned in appellees' favor fixing their damages at \$3,500, and judgment was entered in accordance therewith and in proper form, and of that judgment the appellant now complains.

Appellees' tract of land contains 192 acres, and lies on Perkins creek, about one-fourth of a mile from the corporate limits of the city of Paducah, with a frontage of 1,200 feet on the Paducah and Cairo gravel road, and extending about the same width from the gravel road to the Ohio river. Perkins creek enters the land at a point about 300 feet from where its west line intersects the gravel road, and, running through the land a short distance, leaves it by crossing the west line between 400 and 500 yards from the gravel road, thereby cutting off from the main body of the land about 8 or 10 acres of the southwest corner, which is flat land. But that part of appellees' farm lying on the east side of the creek, extending therefrom to the east line and back from the gravel road, embraces from 12 to 15 acres of high, fertile, and well-drained land suitable for building lots, or for

Chicago, etc., R. Co. v. Rottgering

gardening purposes. This part of the land contains an elevated formation called the "mound," supposed to have been made by an ancient race known as the "Mound Builders." From that part of appellees' land last described the strip desired by appellant for its roadbed was condemned and taken. This right of way, 100 feet in width, and containing 2.93 acres, begins near the northeast corner of appellees' land, runs diagonally through it, and intersects Perkins creek about 400 feet from the gravel road. From there it continues in the same course, and leaves the land a few feet east of the southeast corner of the gravel road.

It appears from the record that in constructing its road appellant made a cut from 60 to 90 feet in width and from 4 to 14 feet in depth from where its right of way entered appellees' land to the east bank of the creek, and from there to where it crosses the gravel road a fill from 15 to 20 feet high was required. By the cut and fill the main part of the farm was separated from that fronting on the gravel road, leaving appellees without any way of crossing the railroad from one point on their land to another, and cutting them off entirely from the eight or ten acres on the west side of the creek; for, in order to get to the land on the west side of the creek, appellees must travel the gravel road beyond their land, and then go through the land of another, and to reach their land on the east side of the creek from one side of the railroad to the other they must go through Maplewood Terrace, a distance of half a mile or more.

It is insisted for appellant, first, that the verdict is not supported by sufficient evidence; second, that incompetent evidence was admitted upon the trial to its prejudice; third, that the court erred in awarding the burden of proof to appellees and in giving their counsel the concluding argument to the jury; fourth, that the court erred in instructing the jury and in refusing instructions asked by appellant. It appears from the record that 25 witnesses were introduced in behalf of appellees and 18 in behalf of appellant upon the trial in the circuit court. We do not think it necessary to undertake a discussion of the evidence in detail. Much of it was conflicting; not, however, as to the main facts, but in the differences of opinion expressed by the witnesses in testifying in regard to the amount of damages sustained by appellees from the taking of their land and the constructing of appellant's railroad thereon. Such of appellees' witnesses as testified in regard to the value of the farm immediately before the taking of any part of it for appellant's road said it was worth from \$18,000 to \$20,000. Appellant's witnesses, testifying upon this point, fixed its value at from \$10,000 to \$12,000. Appellees' witnesses fixed the value of the land taken for the right of way at from \$1,000 to \$2,500, and damages to the remainder of the tract at from \$2,000 to \$2,500; making the aggregate \$3,500 to \$5,000. Upon the other hand, appellant's witnesses placed the damages sustained by appellees at about half, and in some instances less than half, of the amounts fixed by appellees. But

Chicago, etc., R. Co. v. Rottgering

there can be no doubt that the jury had sufficient evidence to justify them in placing appellees' damages at the amount named in their verdict, if they were willing to accept the testimony of their witnesses in preference to that of appellant's witnesses, which they evidently did. And we find nothing in the record that tends to show appellees' witnesses any less intelligent or reputable than those of appellant. It does, however, appear that many of them live nearer the land of appellees, and by reason of that fact were probably better acquainted with its value than were the witnesses of appellant. It is likewise apparent from the evidence that by the construction and operation of the railroad through appellees' land the symmetry of the 14-acre lot fronting on the gravel road has been marred, the best building sites thereon practically destroyed, its value for farming purposes impaired, and their lands separated by a cut and fill in such manner that they cannot cross the railroad to reach a large part of their land, but must get to it by other means, and greater distances, at considerable inconvenience. The jury were permitted to view the ground condemned for appellant's railroad, and the whole of appellees' farm, and by this means were afforded an opportunity not only to test the accuracy of what had been testified to by the witnesses, and the value of their opinions, but also to ascertain for themselves the extent of appellees' damages. In view of the evidence and the opportunity allowed the jury to obtain an ocular demonstration of the facts we are not prepared to say that their estimate of the damages sustained by appellees was excessive, though we think the amount allowed was sufficiently liberal. The question of appellees' damages was one to be tried by the jury, and, as has been repeatedly held by this court, their verdict will not be disturbed upon appeal unless it is apparent that it is unsupported by, or is flagrantly against, the evidence, or so excessive in amount as to indicate that it was the result of passion or prejudice upon the part of the jury.

It is complained by counsel for appellant that the trial court erred in admitting testimony to the effect that appellees' land fronting on the gravel road was, before the running of appellant's railroad through it, suitable for building lots, and also to prove the price at which other adjoining and contiguous lands sold about the time appellees' was taken. As it appears from the evidence that appellees' land was only about a quarter of a mile distant from the corporate limits of the thriving city of Paducah, and that town lots adjoining had been laid off and were in the market for building purposes, we think it was competent to prove the availability and adaptability of their lands for such use, as well as for gardening or farming purposes. In *W. Va. P. & T. R. R. Co. v. Gibson*, 21 S. W. 1055, 15 Ky. Law Rep. 7, it is said: "The court allowed the appellee to prove what was the market value of the strip of land, taking into consideration its close proximity to the town of Pineville, and its adaptability for town lots and building residences thereon, and for railroad

Chicago, etc., R. Co. v. Rottgering

tracks and for other railroad purposes. The question is, was such evidence competent? The rule seems to be that in estimating the value of property taken for public use, the owner is entitled to the reasonable market value of the property, which value must be ascertained, not by what use the property has been actually applied, but with reference to its availability and adaptability for valuable uses, having regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future. The proper inquiry in such case is its value in view of any use to which it may be applied and to all the uses to which it is adapted." The same rule for ascertaining the value of property taken for public use seems to have been approved by the Supreme Court of the United States in the case of *The Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, for in that case it is said: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value, which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is, perhaps, impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." As to the evidence in regard to the prices at which other lands near that of appellees sold, it will suffice to say that such evidence has by this and other courts been declared competent. "Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses, for truly here is where money talks." *City of Paducah v. Allen*, 63 S. W. 981, 23 Ky. Law Rep. 701; *L. & A. & P. V. Elec. Ry. Co. v. Whipps, etc.*, 80 S. W. 507, 25 Ky. Law Rep. 2312; *Railway v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751.

Though objection is made by counsel for appellant to the instructions given by the lower court, it seems to be conceded that instruction No. 1 is correct. By this instruction the jury were told, in substance, that in estimating the direct damages, if any were sustained by appellees, they should allow such a sum as they believed from the evidence was the fair and reasonable value

Chicago, etc., R. Co. v. Rottgering

of the strip of land taken considering it in relation to the entire tract, and such other direct damages, if any, as directly resulted to the remainder of the tract on account of the taking of the strip condemned for the use of appellant's railroad, and such additional improvements, if any, as might be necessary to the reasonable enjoyment by appellees of the land; but that their finding, if any, of direct damages, should not exceed in all the amount they might believe from the evidence was the difference between the actual value of the land immediately before and its actual value immediately after the taking of the 2.93 acres by appellant for its right of way.

By instruction No. 2 the jury were, in substance, told that they might also find for appellees such incidental damages as they believed from the evidence had resulted to the remainder of their land from the taking of the right of way, and the building and operating in a prudent manner of the railroad upon it, but that they should deduct from such incidental damages, if they found any, whatever sum is the worth of the advantage or enhancement in value resulting to the land from the building of the road, and, further, that by the term "incidental damages," as used in the instruction, was meant all the inconvenience actually suffered by appellees as a result of the taking of their land and its use by the railroad company in a proper and prudent manner. It will be observed that instruction No. 1 only authorized the finding by the jury of direct damages, such as the value of the land actually taken for appellant's use, the injury to or diminution in the value of the remainder of the land from such taking, and the cost of such improvements as were rendered necessary by reason thereof, which in this case was additional fencing at a cost to appellees, as shown by the evidence, of \$100. Under the law such damages as the jury were by instruction No. 1 allowed to find could not be reduced or set off by any advantage to or increase in the value of the appellees' land that might result from the building and operating of the railroad thereon. But under the second instruction, which permitted the finding by the jury of incidental damages—that is, compensation to appellees for such inconvenience as resulted to them from the taking of their land and its use by appellant—they were directed to deduct therefrom any advantage to or increase in the value of the remainder of appellees' land that might have resulted from the use by appellant of the strip occupied by its railroad. We are of opinion that the law was correctly given by the court in instructions Nos. 1 and 2, as they conform to sections 13 and 242 of the Constitution and section 836, Ky. St. 1903. We think it will also be found that the statement of the law as contained in the two instructions in question has been approved by this court in the following cases: *W. Va., P. & T. R. R. Co. v. Gibson*, 21 S. W. 1055, 15 Ky. Law Rep. 7; *Asher v. L. & N. R. R. Co.*, 87 Ky. 394, 8 S. W. 854; *L., St. & T. R. R. Co. v. Barrett*, 91 Ky. 489, 16 S. W. 278. Being of opinion that the two

Chicago & M. Electric R. Co. v. Diver

instructions given by the trial court contained all the law of the case, we are unable to see that appellant was prejudiced by the court's rejection of the instruction asked by its counsel.

We are unable to sustain the remaining contention of appellant's counsel that the court erred in adjudging that the burden of proof was upon the appellees. The only questions of fact in the case were tried by the jury, and those questions were raised by exceptions filed by the appellees to the report of the commissioners. No exceptions were filed by appellant to the report, and, if none had been filed by appellees, the report would have been confirmed by the court. Section 838, Ky. St. 1903, provides that: "If no exceptions have been filed by either party, it [the court] shall confirm said report as against the owners not excepting." If, after filing the exceptions, appellees failed to introduce proof, the exceptions would have been overruled, and the report confirmed. Section 526, Civ. Code Prac., provides: "The burthen of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." Manifestly, appellees would have been defeated if no evidence had been given on either side. It follows, therefore, that no error was committed by the court in ruling that appellees had the burden of proof, and were entitled to the closing argument to the jury.

Regarding the record free from any prejudicial error, the judgment is affirmed.

CHICAGO & M. ELECTRIC R. Co. v. DIVER et al.

(Supreme Court of Illinois, Dec. 22, 1904.)

[72 N. E. Rep. 758.]

Eminent Domain—Damages—Sufficiency of Evidence.—On proceedings by a railroad company for the condemnation of a right of way, evidence considered, and held to warrant the damages awarded.

Same—Petition.—The petitioner in a condemnation proceeding is required at his peril to ascertain, and name in the petition the true owner of the land sought to be condemned and taken, and the person so named is not required to prove title.

Same—Cross Petition.—In condemnation proceedings the petitioner in a cross-petition praying for an award of damages to land which is not taken must allege in the cross-petition that he is the owner of the property alleged to be damaged.

Same—Pleadings.—Where, in condemnation proceedings, a landowner files a cross-petition praying for an award for damages to land not taken, if the original petitioner desires to contest the allegation of ownership the issue must be raised by an appropriate pleading.

Same—Ownership of Land.—In condemnation proceedings the issue of ownership of land, if any, is preliminary to the submission of the question of damages to the jury, and is to be determined before the jury is impaneled to assess the damages.

Same—Instructions.—Where, in condemnation proceedings by a railroad to acquire a right of way, both litigants proceeded in charg-

Chicago & M. Electric R. Co. v. Diver

ing the jury on the theory that damages to lands not taken had been established by the evidence, neither could complain of instructions which assumed that such damages were to be assessed.

Instructions.—An appellant cannot complain of error in an instruction where the same ruling was contained in an instruction given at his request.

Condemnation of Land for Railroad Right of Way—Damages—Fences.*—On proceedings by a railroad company to condemn land for a right of way, an instruction that under the statute the railroad company was not required to fence its road until six months after it had completed the same, and that the damages, if any, attending the keeping open of the right of way during that time, were proper for the consideration of the jury as an element of damage, was proper.

Judicial Notice—Railroad Fences.—Judicial notice cannot be taken that the rights of way of railroad companies are fenced as the track is constructed.

Condemnation of Land for Railroad Right of Way—Damages—Market Value—Instructions.—On proceedings by a railroad company to condemn land for a right of way, an instruction that the jury must be confined to the market value of the land, was not erroneous for not confining the jury to the "fair cash market value," they having been informed that the only measure of damages was the fair cash market value in another instruction, and the court in the examination of witnesses having restricted the proof to the fair cash market value of the land.

Same—Same—Danger from Fire—Insurance—Instruction.—Where, on proceedings by a railroad company to condemn lands for a right of way, the jury visited and viewed the premises of D., one of the property owners, on whose land there was no building, an instruction that the element of danger by fire and increased cost of insurance on buildings should be considered on the question of damages was applicable to the proof of damages to the other property owners, and was not prejudicial as to D. because of the fact that there was no building on her premises.

Same—Benefits—Instructions.—On proceedings by a railroad company to condemn land for a right of way, an instruction that in estimating the compensation for land actually taken no deductions could be made because of any benefits which would accrue to other portions of the lands not proposed to be taken was not erroneous on the theory that it should have gone further, and informed the jury that benefits to lands not taken were proper to be considered in estimating the damages to land not taken, other instructions having clearly shown that benefits to land not taken were proper to be considered on the question of damages to land not taken.

Same—Same—Motive Power—Instructions.—Where the charter of a railroad company authorized it to use steam or other motive power, and on proceedings by it to condemn land for a right of way it was not willing to stipulate that it would not use steam, it could not complain that the court instructed the jury that the property owners had the right to have their damages estimated with reference to any motive power that the railroad company might use under its charter.

Same—Same—Value of Land.—On proceedings by a railroad company to condemn land for a right of way, an instruction that in arriving at the value of the land the jury might consider its value for the purpose for which it was shown by the evidence to be most available was no ground for reversal.

Appeal from Lake County Court; D. L. Jones, Judge.

Petition by the Chicago & Milwaukee Electric Railroad Company against Helen E. Diver and others for the condemnation of

*See preceding case and foot-note.

Chicago & M. Electric R. Co. v. Diver

a right of way. From the judgment for damages, petitioner appeals. Affirmed.

F. S. Munro and Charles Whitney, for appellant.

Hanna & Miller, for appellees.

Boggs, J. This was a petition filed by the appellant company for the condemnation of a right of way for the line of its road on and over certain tracts of lands and town lots belonging to the appellees, respectively. The jury awarded the appellee Helen E. Diver \$2,000 for land taken for the right of way and \$2,600 for damages occasioned to land not taken, and the verdict was approved by the court. Counsel for the appellant concede that the amount awarded her for the land taken for the right of way is fair and reasonable, but insist that the damages awarded for lands not taken is excessive, and not supported by the proofs. Mrs. Diver owned a tract of land containing approximately 28 acres, situated between State street on its west, in North Chicago, and the Chicago & Northwestern Railway Company's tracks on the east. A narrow strip of land, belonging to one A. C. Frost, was situate between State street and a portion of Mrs. Diver's tract. The shape of Mrs. Diver's tract of land is substantially that of a square. The right of way of the appellant company, of the width of 70 feet, enters the tract near the northwest corner thereof, and passes in a southerly direction through the tract, passing out near the southwest corner, leaving a strip west of the right of way 16.30 feet wide at the northernmost end and of the width of 128.54 feet at the south end. The length of the strip is 1,160 feet, or thereabout, and it contains 2.14 acres. The right of way contains 1.815 acres, leaving 24 acres east of the right of way. The company stipulated it would construct two crossings across its right of way, each 32 feet in width, at points designated on a plat that was produced before the jury. The crossings were for the purpose of providing access from the lands on the west side of the right of way to the larger tract on the east thereof, and by means of which crossing the 24-acre tract would, in a degree, be made accessible from State street. The strip west of the right of way was well shown to be of the value of \$1,000 per acre. That was the value per acre placed upon the land taken, and the appellant company concedes that such valuation was reasonable and fair. The strip was clearly worth that much, or more, per acre, before the location of appellant's railroad. The lowest estimate of the damage to this tract was 50 per cent. of its value. Seventy-five per cent. of its value was the estimate of some of the witnesses. If computed at 50 per cent., the damages to that tract would be practically \$1,100. Deducting this sum from \$2,600, the total amount allowed for damages to lands not taken, would leave \$1,500 as damages to the 24-acre tract east of the right of way. The testimony of the witnesses produced on behalf of Mrs. Diver was, in substance, that the 24-acre tract was best adapted to and most valuable for

Chicago & M. Electric R. Co. v. Diver

subdivision into lots and blocks for residence purposes, and that for such purposes it would be depreciated in value from 10 to 15 per cent. All of the witnesses, as counsel for the appellant in their brief concede, practically agreed that the land was worth \$1,000 per acre for subdivision purposes. Estimating the depreciation at 10 per cent., the lowest estimate of the percentage of depreciation for such purpose, the damages to this tract would be \$2,400, which, added to the damages of \$1,100, clearly shown to be occasioned to the strip west of the right of way, would make the total of the damages to the land of Mrs. Diver not taken \$3,500—\$900 greater than the judgment sought to be reversed. Witnesses for the appellant company were of the opinion, and so testified, that the value of the 24-acre tract would be enhanced for manufacturing purposes by the construction of the railroad contemplated by the appellant company, and that its value for such purposes would be as great as it would have been for subdivision purposes before the construction of the railroad. There was a conflict in the testimony as to the purpose for which the land was best adapted and for which it was most valuable, and we are unable to say there was a decided weight of testimony supporting the view of the appellant company. The jury visited and inspected the premises and the surroundings, and had superior facilities and opportunity thereby for applying the testimony relative to this conflict, and for determining whether the location of appellant's railroad would so affect the property as to render it as valuable for manufacturing purposes after the construction of the road as it was for subdivision purposes prior thereto. The amount allowed for damages to land not taken was clearly within the range of the testimony, and there is no reason we should disturb the verdict on the ground it is not supported by the proof.

The appellee Peter Fortune owned lots Nos. 8 and 9 in Lenox's Subdivision of the south half of section 33, etc. He was allowed \$240 for the portions of his lots which were taken and was awarded damages in the sum of \$300 to the portions not taken. It is urged the amounts so allowed are unreasonable, and against the weight of the evidence. Lot 8 lies adjoining to and immediately north of lot 9. The lots have a frontage of 25 feet each on State street and extend 125 feet eastward to an alley 16 feet in width. The right of way of appellant's road occupied the alley, and extended over the easterly part of both of appellee's lots, taking therefrom a strip of the width of 24.6 feet at the north line of lot 8 and 35.14 feet at the south line of lot 9. The evidence of the greater number of witnesses estimated the value of the parts of the lots which were taken at a somewhat lesser amount than was allowed. One witness, however, estimated the value of the portions of the lots taken at a greater sum than was awarded. The jury saw the premises, and seem to have reached the conclusion that the evidence of this latter witness was entitled to the greater weight. We incline to the

Chicago & M. Electric R. Co. v. Diver

same conclusion. The two lots, as appeared from the testimony of all of the witnesses, were worth at least \$1,000, exclusive of the buildings that stood thereon. One-fifth of lot 8 and one-fourth of lot 9 were actually taken, and it is clear that we cannot say that \$240 was palpably an excessive allowance for the parts of the lots that were taken. The allowance of \$300 as damages to the parts of the lots not taken was much less than the greater weight of the evidence would have warranted. The lots were materially shortened, and were deprived of the benefit of an alley or any means of access to the rear as shortened, except by appropriating a portion of their frontage to that purpose.

Appellee Gibbons owned lot No. 10 in the same subdivision as the Fortune lots. His lot has a frontage of 25 feet on State street, and extends eastward 125 feet to an alley 16 feet in width. The right of way of appellant's road covered the alley and extended over the easterly portion of the lot a distance of 35.14 feet at the north line of the lot and 41.18 feet at the south line thereof. The strip taken was valued at \$400 by the jury, and \$300 was awarded as damages to the remainder of the lot. On the property taken there were a frame stable 16 by 22 or 24 feet and a frame water-closet. The witnesses who testified as to this property variously estimated the value of the part of the lot that was taken and the damage to the remainder. The witnesses, except two of them, estimated the value of the land taken and the damage to that not taken at greater amounts than were fixed by the award of the jury. One of these two excepted witnesses—James G. Smith—valued the land taken at \$100 less than the jury allowed, but he estimated the damage to the land not taken at \$100 more than the award. The total of his estimate is the same as the total award made by the jury. The other of the excepted witnesses—one Fred W. Cornish—differed so widely from all others who testified in this case that it is not strange his testimony did not control.

The only complaint as to the verdict and judgment as to the property of appellee Mary E. Thomas is that the verdict is erroneous because it allowed to her damages to lot No. 2 without any proof that she was the owner of the lot. The petitioner in a condemnation proceeding is required, at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named as owner in the petition is not required to prove title. *Peoria, Pekin & Jacksonville Railroad Co. v. Laurie*, 63 Ill. 264; *St. Louis & Southeastern Railway Co. v. Teters*, 68 Ill. 144. The petitioner in a cross-petition who prays for an award for damages accruing to land which is not taken must allege in the petition that he or she is the owner of the property alleged to be damaged. If the original petitioner desires to contest the allegation of ownership by the cross-petitioner, he or it must, by appropriate pleadings, raise that issue. It is not contended that any such issue was raised in the case at bar. Had such issue been raised, it would

Chicago & M. Electric R. Co. v. Diver

not have been submitted to the jury impaneled to assess the damages to be paid the landowner. The jury impaneled in this proceeding had no other duty to perform than to assess the value of land taken and the damages occasioned to land not taken. *Lieberman v. Chicago & South Side Rapid Transit Railroad Co.*, 141 Ill. 140, 30 N. E. 544. In a condemnation proceeding the issue of ownership, if any, is preliminary to the submission of the question of damages to the jury, and is to be litigated and determined before the jury is impaneled to assess the amount to be paid the owner. No question of title or ownership should be presented to the jury impaneled in such a proceeding.

It is urged that the court erred in giving instructions Nos. 1 and 2, and that for such alleged error the judgments should be reversed. The complaint as to these instructions is that they are so drawn as to imply that the lands not taken were damaged. These instructions were so carelessly drawn that the criticism is not wholly unfounded. But the implication, if any, was one which the appellant also proceeded upon in the instructions to the jury asked in its behalf. Instructions Nos. 5, 10, and 11 asked and given on behalf of appellant assumed that damages were to be assessed to lands not taken, and the implication in each of these instructions is more definite and direct than in instructions 2 and 3 given at the request of the appellees. Both litigants having proceeded in charging the jury on the theory damages to the lands not taken were established by the proofs, neither can be allowed to urge the action of the other as error. Moreover, there was no substantial ground on which to insist that damages for land not taken should be wholly denied to any of the cross-petitioners.

The complaint that said instruction No. 2 erroneously defined the "character of benefits" to lands not taken which may be deducted from the damages sustained by such property may also be disposed of by saying that instruction No. 19 asked and given at the request of appellant declared the same rule as did instruction No. 2.

Instruction No. 3 for appellees advised the jury that under the statute the appellant company was not required to fence its road until six months after it had completed the same, and that the damages, if any, attending the keeping open of the right of way during that time, were proper for the consideration of the jury as an element of damage. This instruction was approved by this court in *St. Louis, Jerseyville & Springfield Railroad Co. v. Kirby*, 104 Ill. 345, *Centralia & Chester Railroad Co. v. Rixman*, 121 Ill. 214, 12 N. E. 685, and *Centralia & Chester Railroad Co. v. Brake*, 125 Ill. 393, 17 N. E. 820. The instruction here given did not, as did the instruction in the case last cited, assume that damages would necessarily attend the keeping open of the farm by the failure to fence, and the instruction given in that case was for that reason, and none other, condemned. The court cannot, as counsel for appellant urge, take judicial notice,

Chicago & M. Electric R. Co. v. Diver

as being a matter of common knowledge, that the rights of way of railroad companies are fenced as the track is constructed. The appellant company could have lawfully stipulated that it would fence its track and right of way at once on taking possession thereof, and thus have removed this element of damage from the consideration of the jury; but it declined to do so, and expressly so framed the stipulation it did submit as to stipulate only that it would construct and maintain fences along its right of way within six months after its line was open for use.

Instruction No. 4 given in behalf of the appellees charged the jury that in assessing damages, "their inquiries must be confined to the market value of the land," etc. It is urged that the judgments should be reversed because the instruction did not expressly confine the inquiry of the jury to the "fair cash market value of the land." The jury were expressly informed that the only measure of damages was the "fair cash market value" thereof by instructions Nos. 1, 13, and 14 given on behalf of the appellees, and also with equal explicitness and directness in instructions Nos. 1, 7, 10, and 20 given in behalf of the appellant. Moreover, the court, in the examination of witnesses, restricted the proof to the fair cash market value of the land, and the jury had no other testimony on which to act. When the instructions are considered as a series, there is no room for the contention that the jury were misled to understand that some other standard of value than the "fair cash market price" could be considered by them.

Instruction No. 5 informed the jury that the element of danger by fire, if the jury believed there would necessarily be any increased danger from fire arising from the lawful operation of the contemplated road, or that the cost of insuring the buildings thereon would necessarily be increased by the building and operation of the road, and that the value of the premises would thereby be decreased, if proven, were proper for the consideration of the jury in arriving at a conclusion on the question of damages. It is urged the judgment in favor of Mrs. Diver should be reversed because of the giving of this instruction, as there was no building on her premises, and no proof in her case relating to her premises upon which to base the instruction. The instruction was applicable to the proof of damages to be allowed other property owners defendant to the condemnation proceeding near whose buildings the road would run, and was proper as applied to those cases. The evidence showed that there was no building on Mrs. Diver's land, and the jury visited and viewed her premises, and we cannot conceive that it can be seriously contended that any injury could have resulted to the appellant from the giving of this instruction.

Instruction No. 6 cannot be construed as likely to mislead the jury to believe that the possibilities of injuries to persons or property from the negligent operation of the road was proper for their consideration. The instruction clearly refers only to

Chicago & M. Electric R. Co. v. Diver

actual and appreciable injuries resulting from the construction and operation of the railroad in a lawful manner and without negligence.

Instruction No. 7 was intended to advise the jury, and did no more than to advise them, that in estimating the compensation for land actually taken no deductions could be made because of any benefits which would accrue to other portions of the lands not proposed to be taken. The criticism of this instruction is that it should have gone further, and informed the jury that benefits to land not taken were proper to be considered in estimating the damages to land not taken. That benefits to land not taken were proper to be considered when arriving at a conclusion as to damages accruing to land not taken was repeatedly made known to the jury in a number of other instructions given at the request of the litigants, and the complaint that it was not again repeated in instruction No. 7, which had no relation to the question of damages to lands not taken, is so trivial that it, perhaps, might better have been passed without notice.

The charter of the appellant company authorized it to use steam of any other motive power in propelling its trains. The appellant company was not willing to stipulate that it would not use steam as a motive power, and has no right to complain that the court instructed the jury, as it did in instruction No. 8, that the property owners had the right to have their damages estimated with reference to any motive power the appellant, under its charter, might elect to use. *Lieberman v. Chicago & South Side Rapid Transit Railroad Co.*, supra, is authority for the principle announced in this instruction.

The only objection to instruction No. 9 not disposed of by what has been hereinbefore said is that the instruction declares that in arriving at the value of the land the jury may consider its value for the purpose for which it is shown by the evidence to be most available. Counsel for appellant declare that the true rule is "that the value of the property shall be arrived at upon the basis of the uses and purposes for which it is best adapted." We content ourselves with the observation that we are unable to agree that the judgments should be reversed and new trials awarded because of the giving of this instruction.

The remarks made in disposing of other alleged errors fully answer the criticisms advanced against instructions Nos. 10 and 11 given in behalf of appellees.

The record is free from error reversible in character, and the judgments are affirmed.

Judgment affirmed.

RICHMOND & P. ELECTRIC RY. CO. v. SEABOARD AIR LINE RY.

(Supreme Court of Appeals of Virginia, Jan. 12, 1905.)

[49 S. E. Rep. 512.]

Eminent Domain—Railroad Right of Way—Condemnation—Continuance.—Code 1887, §§ 1075, 1076, 1079, provide for the condemnation of a railroad right of way; and section 1081 declares that no order or injunction shall be awarded to stay the prosecution of the work, unless the company is transcending its authority, or such injunction is required to prevent injury which cannot be adequately compensated in damages; and section 1084 provides for a proceeding to ascertain what persons are entitled to the fund awarded for land taken, and in what proportions. Held that, under such sections, alleged owners of land sought to be condemned for a railroad right of way were not entitled to have the proceedings stayed pending a suit in equity between such alleged owners, involving the title to the land.

Same—Amount of Award—Presumption of Correctness.—Under Code 1887, § 1079, providing that the report of commissioners in railroad condemnation proceedings shall be confirmed, unless good cause is shown to the contrary, and that the amount awarded may be paid into court, or to the persons entitled thereto, the amount awarded to landowners by such report is to be treated as *prima facie* correct.

Same—Remote and Speculative Damages.*—In a proceeding to condemn land for a railroad right of way, the fact that the land was available for a public park, and that the owners intended to improve the same for that purpose in the future, and use it as a source of revenue in connection with an electric railway, was too speculative, remote, and conjectural to be considered as an element of damage.

Error to Chesterfield County Court.

Proceedings by the Richmond, Petersburg & Carolina Railroad Company, continued by the Seaboard Air Line Railway, its successor, for the condemnation of a right of way. From an award of damages, the Richmond & Petersburg Electric Railway Company brings error. Affirmed.

WHITTLE, J. In April, 1899, the Richmond, Petersburg & Carolina Railroad Company, the predecessor of the defendant in error, the Seaboard Air Line Railway, instituted proceedings under chapter 46 of the Code of Virginia, edition of 1887, in the county court of Chesterfield county, to condemn a right of way through a tract of 435 acres of land situated in said county, on the Manchester & Petersburg Turnpike, about seven miles from the city of Manchester, and known as the "Madill Tract." At the time of the institution of these proceedings, George A. Madill, the proprietor of record of this land, was a nonresident of the state, and James Bellwood, his agent, was tenant of the freehold. Subsequently, it appearing that Bellwood had acquired a conveyance to the property, the former proceedings were abandoned, and new proceedings instituted against him individually.

At the June term, 1899, the county court, over the objection of

*See preceding case and foot-note.

Richmond & P. Electric Ry. Co. v. Seaboard A. L. Ry

Bellwood, appointed a commission, composed of five disinterested freeholders, to ascertain what would be a just compensation for the land proposed to be taken, and for damages to the residue.

It appears that Bellwood's farm tract, through which the railroad was also to pass, adjoins the Madill tract, and for damages to both tracts the sum of \$12,348.85 was awarded. With respect to these properties the commissioners, in their report, say: "Of a portion of the land from which the strip or part of land above described, and which is required by the Richmond, Petersburg & Carolina Railroad for its purposes, is carved or taken, James Bellwood appears to be the absolute and unquestioned fee-simple owner. Of another portion, known as the Madill or Drewry's Bluff tract, but recently required by the said James Bellwood, it appears from the evidence before us that, while the fee-simple title also stands in the said James Bellwood, upon the records, he is in fact only trustee of the latter tract; holding the legal title for the Richmond & Petersburg Electric Railway Company, the equitable or beneficial owner. By consent of parties, this latter company was permitted to appear before your commissioners as the true owner, and show its title and claim to damages occasioned by the taking of said strip, part, or portion from the Madill tract, and for convenience, and to avoid future contest and uncertainty between James Bellwood and the Richmond & Petersburg Electric Railway Company respecting the rightful share or proportion of each of the damages awarded, it was further agreed between the Richmond, Petersburg & Carolina Railroad Company, James Bellwood, and the Richmond & Petersburg Electric Railway Company that your commissioners should make an apportionment of the sum of damages above awarded between the said James Bellwood and the Richmond & Petersburg Electric Railway Company, what portion of said sum should go to each of said parties. Accordingly, in pursuance of this agreement or understanding, of the sum of \$12,348.85 above fixed and awarded by us as damages, we apportioned to James Bellwood the sum of \$11,353.45, and to the Richmond & Petersburg Electric Railway Company the sum of \$995.40, as compensation to them severally for the land actually taken from each, and for the damages to the residue of their respective tracts, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed."

Affixed to the report is the following statement, signed by counsel for Bellwood, the Richmond & Petersburg Electric Railway Company, and the Richmond, Petersburg & Carolina Railroad Company: "We hereby confirm the above in all respects save as to the correctness of the damages awarded, which is not admitted."

The report of the commissioners was returned August 14, 1899, and confirmed by the county court June 13, 1901, as to the James Bellwood farm tract, and leave was given either party to make objection thereafter to the award with respect to the Madill tract.

Richmond & P. Electric Ry. Co. v. Seaboard A. L. Ry

In December, 1902, upon motion of defendant in error, the Seaboard Air Line Railway, successor of the Richmond, Petersburg & Carolina Railroad Company, the county court, upon the evidence and argument of counsel, confirmed the award as to the Madill tract, no good cause being shown against it. To that order a writ of error was awarded by this court.

There are practically but two assignments of error in the case. It is contended:

First, that the county court erred in overruling the motion of plaintiffs in error for a continuance; and

Second, that the amount of damages awarded by the commissioners was inadequate—a result, it is said, chiefly owing to the refusal of the commissioners to take into consideration an important and essential element of damages in fixing the amount of their award.

The ground of the motion for a continuance was the pendency of a suit in equity in the law and equity court of the city of Richmond between Bellwood and Beach and others, involving the title to the Madill tract, the termination of which suit, it was insisted, a trial of the condemnation proceedings should await.

Aside from the circumstance that plaintiffs in error were parties to the condemnation proceedings, with the fullest opportunity of introducing testimony in their own behalf, and of being heard by counsel, both before the commissioners and the county court, their contention would plainly contravene the terms and policy of the statute under which these proceedings were had.

Chapter 46 of the Code of 1887 provides for service of notice on the tenant of the freehold, if there be such tenant (section 1075); the appointment of commissioners upon that notice (section 1076); the prompt return and confirmation of the report, unless good cause be shown against it, the payment of the damages assessed into court, and the absolute vesting of the title in the company to the part of the land for which such compensation is allowed (section 1079); the right of the company to enter upon the premises condemned and construct its work, and that no order shall be made nor any injunction awarded to stay the prosecution of the work, unless it be manifest that the company is transcending its authority, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages (section 1081); and finally, in order that the money paid into court may be properly disposed of, that a reference to a commissioner may be had to ascertain what persons are entitled to the fund, and in what proportions (section 1084).

It is obvious from the foregoing enactments that it was the policy of the Legislature to provide a summary remedy for condemning land for works of internal improvement, where the company and owner could not agree on the terms of purchase, and not to obstruct the company in the acquisition of a good title to the land needed for its purposes, or in the prosecution of

Richmond & P. Electric Ry. Co. v. Seaboard A. L. Ry

its work, by controversies in respect to the title, but to transfer such controversy from the land to the fund which the company is required to pay into court. *Va.-Carolina Co. v. Booker*, 99 Va. 633, 39 S. E. 591; *Ches., etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 723, 40 S. E. 20; *Fulkerson v. Taylor*, 102 Va. 314, 321, 46 S. E. 309.

In the case of *Ches. & W. R. Co. v. Washington, etc., R. Co.* the court, at page 724, 99 Va., page 22, 40 S. E., in giving the reason for the rule, says: "If this be not the case, railroad companies would have no assurance that the steps taken by them to procure rights of way or property wanted for their purposes would conclude any one, and they would be constantly subject to vexatious litigation. This view is not only in accordance with the better reason, but is sustained by the weight of authority. See 2 Mills on Em. Domain (2d Ed.) §§ 388, 389, 391; *B. & O. R. Co. v. P., W. & Ky. R. Co.*, 17 W. Va. 844, and cases there cited; *St. Joseph R. Co. v. Hannibal, etc., R. Co.* (Mo. Sup.) 6 S. W. 691; *Secombe v. R. Co.*, 23 Wall. 109, 119, 23 L. Ed. 67; 1 Red. on Rys. (5th Ed.) 271."

The court is therefore of opinion that the first assignment of error is not well taken.

In considering the second assignment of error, namely, that the amount of damages awarded by the commissioners is inadequate, it must be borne in mind that, by provision of the statute, the report of the commissioners is to be taken as *prima facie* correct. Va. Code 1887, § 1079.

In the very nature of things, the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof. The commissioners are disinterested parties. They act under the solemnity of an oath, and are selected by the court from a conservative class of citizens—freeholders—on account of their peculiar fitness for the service to be rendered. They also possess the advantage of inspecting the property, and of seeing the witnesses and hearing them testify.

In the case of *Crawford v. Valley R. Co.*, 25 Gratt. 467, Judge Bouldin, speaking for the court, said: "We hold it to be clear and unquestionable, under the plain mandate as well as the spirit of the statute, that the report of the commissioners, ascertaining the amount of compensation and damages to be paid to the landowner, must be confirmed by the court, and judgment entered for the amount reported, unless, in the words of the statute, 'good cause be shown against it.' This makes the commissioners' report, if no illegality nor irregularity appear on its face, at least *prima facie* evidence of the propriety and correctness of the award of compensation and damages; and that award must therefore stand as the judgment of the court, or, rather, the judgment of the court must accord therewith, unless some sufficient matter be established to vary or arrest it. The landowner must be passive, and the entire onus of showing such sufficient cause is thrown on the objector."

Richmond & P. Electric Ry. Co. v. Seaboard A. L. Ry

And so, in *Cranford Paving Co. v. Baum*, 97 Va., at page 501, 24 S. E. 906, Judge Riely, in delivering the opinion of the court, observes: "When it becomes necessary to ascertain what is just compensation for land taken for a public use, as in the present case, the statute directs that the court shall appoint five disinterested freeholders as commissioners to perform this duty, and requires that in its performance they shall themselves view the land so taken. The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself, which is taken, and judging as to its value, and of determining the effect of the opening of the road upon the residue of the tract. They have, as they also had here, after having their attention specially drawn to the element of damage relied upon, the opportunity to apply the evidence produced before them to the subject of the controversy, and to determine the weight to be given to its several parts. We are without the benefit of their opportunities, and of what they saw and were the judges, and it should be a very clear case, indeed, of inadequate compensation, to justify the court in disturbing their sworn, deliberate, and disinterested judgment, as disclosed in their report." *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750.

In the case of *Shoemaker v. United States*, 147 U. S. 306, 13 Sup. Ct. 393, 37 L. Ed. 170, the court said: "The rule on this subject is so well settled that we shall content ourselves in repeating an apt quotation from *Mills on Eminent Domain*, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of commissioners, to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.'"

But it is insisted that it was the purpose of promoters to develop the Madill tract as a public park, to be used in conjunction with the electric railway by the expenditure of thousands of dollars in the erection of a summer hotel, casinos, pleasure buildings, ballground, golf links, and other improvements, and that its value for such uses was practically destroyed by the construction of the defendant in error's railroad through the property. That it was therefore the duty of the commissioners, in making up their award, to have treated the property as a park,

Richmond & P. Electric Ry. Co. v. Seaboard A. L. Ry

and not to have based their estimate upon its actual condition at the time the award was made.

This court cannot assent to the soundness of that proposition. In that connection the commissioners, in their supplemental report, say: "This claim, so far as based upon evidence of future indications and investments, the commissioners disallowed and rejected, holding the same as too speculative, remote, or conjectural for them to be able to estimate, and, in making their estimate and award, as above stated, took the said land in its present conditions, with its adaptability as it at present stands to-day."

The above is a correct and succinct exposition of the principle of law which should control commissioners in arriving at a proper award. The reason of the rule is plain, and a departure from it would transfer the inquiry from the field of fact to that of fancy and speculation. It is the present actual value of the land, with all its adaptations to general and special uses, and not its prospective or speculative or possible value, based upon future expenditures and improvements, that is to be considered.

In the case of Schuylkill River, etc., R. Co. v. Stocker, 128 Pa. 233, 18 Atl. 399, it was held that the jury was not to value the tract upon the theory of what it might bring, platted and divided up into building lots; that they were to inquire what a present purchaser would be willing to pay for it in its present condition, and not what a speculator might be able to realize out of a resale in the future. See, also, S. W., etc., R. Co. v. Abell, 18 Mo. App. 637; Pinkham v. Chelmsford, 109 Mass. 228; Penn. R. Co. v. Cleary, 125 Pa. 451, 17 Atl. 468, 11 Am. St. Rep. 913.

"The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown; and, if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, what is its worth in the market." 2 Lewis on Em. Dom. 1056, 1057.

The above is substantially the doctrine enunciated by the Supreme Court of the United States in Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, cited by this court with approval in R. & M. R. Co. v. Humphreys, 90 Va. 425, 436, 18 S. E. 901.

The record shows that, as a matter of law, the award of the commissioners was founded upon correct principles, and, as there was ample evidence to sustain it, the order complained of is without error and must be affirmed.

ILLINOIS, I. & M. RY. CO. *v.* FREEMAN et ux.

(Supreme Court of Illinois, June 23, 1904.)

[71 N. E. Rep. 444.]

Eminent Domain—Condemnation Proceedings—Challenge of Jurors.—Where land involved in condemnation proceedings consists of but one tract, and is owned by several persons, each of whom has an undivided interest therein, such persons together constitute but one "party interested," within the meaning of section 7 of the eminent domain act (Hurd's Rev. St. 1903, p. 909, par. 7), providing that every party interested in the ascertainment of compensation shall have the same right of challenge of jurors as in other civil cases; and hence, under Practice Act, § 48 (Hurd's Rev. St. 1903, p. 1406, par. 49), providing that each party shall be entitled to a challenge of three jurors without showing cause for such challenge, such persons are entitled to but three peremptory challenges in the aggregate.

Same—Same—Damage to Land Not Taken—Evidence.—In condemnation proceedings, on the issue of damage to land not taken, evidence that other land similarly situated had been benefited by a road crossing it in the same way that the petitioner proposed to extend its line across the farm in question was properly excluded.

Same—Same—Same—Same.*—Where a public highway divided a farm into two parts, petitioner in condemnation proceedings should have been permitted, on the issue of damages to the land not taken, to introduce evidence in reference to the damages that would be sustained by the land on one side of the highway separately from that portion of the land lying on the other side.

Same—Same—Same—Same.—In condemnation proceedings, where a witness had stated the elements of damage to the land not taken, as a basis for the opinion he had expressed, it was proper to exclude a cross-question asking him why he stated that the damage was \$50 an acre, rather than \$40, \$60, or \$75.

Instructions.—The refusal of instructions which state propositions embraced in other instructions given is proper.

Condemnation Proceedings—Discrimination against Railroad—Instruction.—In condemnation proceedings, an instruction attempting to state that the jury should not discriminate against petitioner because it was a railroad, when couched in misleading language, was properly refused.

Damages.*—In condemnation proceedings, the purposes for which the land is adapted or may be used are immaterial on the question of damages, unless such purposes actually affect its present cash value.

Same.*—The danger to persons crossing and recrossing a railroad's proposed tracks is so remote that it does not form a proper basis for the assessment of damages in condemnation proceedings.

Same.*—Since the law requires a railroad to use the most improved contrivances to prevent the escape of fire, and since it is responsible for damages occasioned through any negligence in that regard, a jury, in condemnation proceedings by a railroad, should not, in arriving at their verdict, consider any loss or damage that might accrue from such negligence.

Same—Evidence.—The jury in condemnation proceedings should not, in arriving at their verdict, average the testimony of witnesses on the question of land damages and values.

Appeal from Kane County Court; W. H. Heimbaugh, Judge.

Condemnation proceedings by the Illinois, Iowa & Minnesota Railway Company against Harry K. Freeman and wife.

*See preceding case and foot-note.

Illinois, etc., Ry. Co. v. Freeman

From the judgment entered on the verdict rendered for damages, petitioner appeals. Reversed.

This was a proceeding instituted by the Illinois, Iowa & Minnesota Railway Company in the county court of Kane county for condemnation of a right of way across appellees' farm, in said county. The petition sets out the land sought to be condemned, which consists of a strip containing 3.709 acres, and prays that the just compensation to be made to appellees on account of the use of said real estate be ascertained and assessed by the court. Appellees filed a cross-petition alleging that they were also owners of other land contiguous to the property sought to be condemned; that all of said real estate was used by them in its entirety, as one tract, containing 126.42 acres; and alleging that the remainder of said premises, other than the strip sought to be taken, would be damaged, by locating said right of way through said premises, in the sum of \$10,000; and praying that such damages may be awarded to them by the jury which fixes the compensation for the taking of the strip for a right of way.

The farm is owned by appellees, who are husband and wife, jointly, and is located about three miles west of the city of Aurora, Ill. It is rectangular in shape, and the distance between its northern and southern boundaries is about $3\frac{1}{2}$ times as great as between its eastern and western boundaries. A macadamized public highway, known as the "Galena Road," running east and west through the farm, divides it into two parts. The part north of the highway contains about 60.7 acres, and the part south of the highway about 55.3 acres. The part north of the highway has a creek running through it in an easterly and westerly direction. There are 15 to 20 acres of land in cultivation between the creek and the Galena Road; then there are about 10 acres of low bottom land along the creek, not susceptible of cultivation; and the remainder north of the creek is covered with timber and stumps. The part south of the Galena Road is all in a high state of cultivation, and is more valuable than the part north of the road. This south part also contains the improvements, consisting of a large residence, a smaller house, designated as a "tenant house" a large barn, and numerous outbuildings. The barn is a large structure, containing 17 box stalls and 4 single stalls, as well as a harness room, toolroom, and carriage room. The improvements also include a large corncrib, icehouse, hog sheds, and a wellhouse, with a windmill and gasoline engine for pumping water, and are estimated by the witnesses to be worth from \$8,000 to \$12,000. The farm has been used as a stock farm and country home, and is well adapted for those purposes. A road extends along the east side of the tract south of the highway, and joins with the highway at the northeast corner of said tract. The improvements on the farm are all located in the northeast corner of this latter tract, and are 35 or 40 rods from the strip taken in this proceeding for a right of way. The right of way does not touch the tract north

Illinois, etc., Ry. Co. v. Freeman

of the Galena Road, but crosses that part south of the road in a northeasterly and southwesterly direction, dividing it into two irregular and triangular-shaped fields; the north field, on which are located the improvements, containing 18.1 acres, and the south field 37.2 acres.

The testimony for appellant fixes the value of the entire farm, with the improvements, at \$135 to \$165 per acre, and without the improvements at \$80 to \$100 per acre, while that for respondents fixes its value with improvements at \$175 to \$190 per acre, and without the improvements at \$100 to \$130 per acre. Witnesses for the petitioner fixed the value of the tract south of the Galena Road, without improvements, at \$85 to \$125 per acre, and the witnesses for appellees were not questioned in reference thereto, and expressed no opinion as to such value. The damage to the portion of the farm not taken was variously estimated by the witnesses for the petitioner at \$1,000 to \$1,500, and by the witnesses for respondents at \$50 to \$60 per acre. The jury viewed the premises.

The verdict rendered was for \$637.50 as just compensation for the land actually taken, and \$4,280.50 as damages to the remainder of the land not taken. A motion for a new trial was overruled, and judgment entered on the verdict. Petitioner appealed.

The grounds relied upon for a reversal are (1) that in impaneling the jury the court improperly permitted two peremptory challenges on behalf of Harry K. Freeman and two on behalf of Gusta C. Freeman; (2) the court erred in passing on objections to testimony; (3) the verdict is excessive and is not within the range of the evidence; (4) the court improperly refused the appellant's instructions Nos. 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37; and improperly gave appellees' instructions Nos. 10, 12, 13, and 14.

Murphy & Alschuler (Charles E. Clyne, of counsel), for appellant.

Hopkins, Dolph & Scott and *Russell & Hazlehurst*, for appellees.

SCOTT, J. (after stating the facts). There was but one tract of real estate involved in the case at bar. Each of the respondents owned an undivided one-half thereof. They were permitted to exercise four peremptory challenges, on the theory that each was entitled to three challenges of that character. In impaneling the last four jurors, each of the respondents exercised one peremptory challenge. One of the jurors called into the box to take the place of the two so challenged was the juror Mead. Petitioner challenged this juror for cause, which was overruled; and thereafter, having exercised three peremptory challenges, petitioner challenged this juror peremptorily, and this challenge was also overruled. Section 48 of the practice act (Hurd's Rev. St. 1903, p. 1406, par. 49) provides: "In all civil actions each

Illinois, etc., Ry. Co. v. Freeman

party shall be entitled to a challenge of three jurors without showing cause for such challenge." Under this provision we have held that the word "party" includes all persons, plaintiff or defendant, however numerous they may be, and that all persons, plaintiff or defendant, are entitled, in the aggregate, to but three peremptory challenges. *Cadwallader v. Harris*, 76 Ill. 370; *Schmidt v. Chicago & Northwestern Railway Co.*, 83 Ill. 405. Section 7 of the act on eminent domain (Hurd's Rev. St. 1903, p. 909, par. 7) provides: "The petitioner, and every party interested in the ascertaining of compensation, shall have the same right of challenge of jurors as in other civil cases in the circuit courts." Appellees contend that the words "every party interested" mean "each person interested," and in this connection refer us to the case of *Fitzpatrick v. City of Joliet*, 87 Ill. 58. In that proceeding a number of separate parcels of property, owned by different persons, were involved, and the compensation for each was assessed by the same jury. It was there properly held that each person, being the owner of a separate tract, was entitled to three challenges. The statute provided that the judgment should have the effect of a several judgment as to each tract or parcel assessed. Under these circumstances, the proceeding was virtually a separate suit as to each tract and owner. Here, however, there is but one tract. Each of the owners holds an undivided interest, and the term "party" must be given the same meaning as it has in the language above quoted from the practice act. Appellees correctly assume that a petitioner is entitled to but three peremptory challenges, but contend that respondents, each being the owner of an undivided interest, if 100 in number, would be entitled to 100 times as many such challenges. Such could not have been the legislative intent. Where the land involved consists of but one tract—that is, where it all lies in one body—although it may be described as several lots or parcels, and it is owned by several persons, each of whom has an undivided interest therein, such persons constitute but one "party interested," and are entitled to but three peremptory challenges, in the aggregate, in a proceeding under the act in reference to eminent domain. The case of *Gordon v. City of Chicago*, 201 Ill. 623, 66 N. E. 823, cited by appellant, is distinguished from this one by the fact that it is under the statute in reference to special assessments.

A number of questions are presented in regard to the admissibility of evidence. We will discuss only those which it seems will necessarily arise upon another trial of the cause.

The proposed road of petitioner will run diagonally across respondents' farm. The Chicago & Iowa Railroad runs through the same neighborhood. Petitioner sought to prove that the farms which either joined the right of way of that road, or were cut in two diagonally by its tracks, sold for the highest prices; that farms more remote sold for much less, although they were of the same general character—and also sought to show that

Illinois, etc., Ry. Co. v. Freeman

there is an angling public highway leading from the city of Aurora northwesterly, in Kane county, which cuts all the farms along its line into irregular and triangular-shaped fields, and that this did not lessen the cash market value of those farms. A consideration of the most elementary principles of the law of evidence shows that this offer was properly refused. The question is whether or not this farm would be damaged, aside from the value of the land actually taken, and, if so, how much. To prove that other land similarly situated has been benefited by a road crossing it in the same way that petitioner proposes to extend its line across this farm would be to open the door for respondents to show, if they could, that the value of still other farms of a similar character had been decreased by having a railroad extended across them in like manner, and would result in trying the question of damages and benefits to lands other than respondents'. If it increases the value of a farm in Kane county to be cut in two diagonally by a railroad, that fact is, no doubt, known to many persons. If such persons acquaint themselves with this farm, they will then be qualified to testify that the market value of that portion of this farm which is not taken by petitioner will be increased by being cut in two diagonally by petitioner's line, if they believe that to be the case. It is to the effect of the proposed line on this particular farm that petitioner must confine itself in taking the views of its own witnesses in reference to the damages or benefits resulting from extending a railroad diagonally through a farm.

A public highway, running east and west, divides this farm into two parts. The railroad will run across that part south of the highway, and will not touch that part north of the highway. When petitioner offered its evidence in regard to the amount of damages which would be sustained by the land not taken, it sought by its interrogatories to take the views of its witnesses in reference to the damages that would be sustained by the land north of the highway, if any, separately from that portion of the land lying south of the highway. The court refused to permit this, and erred in so doing. It is possible that the land north of the highway would not be damaged at all. One witness so testified, but on respondents' motion the answer was stricken out. Those who gave evidence for appellees testified that all the land not taken would sustain damages, and fixed the amount per acre. By the method followed by the court, appellant's witnesses were compelled to state in a lump sum how much they considered the land of the entire farm not taken damaged. Where the view of a witness was that the land north of the highway was not damaged, we think he should have been permitted to testify to that fact, so that the jury might have the benefit of his testimony in determining whether any compensation should be awarded on account of depreciation in the value of land lying on that side of the highway.

Complaint is also made because the court sustained an objec-

Illinois, etc., Ry. Co. v. Freeman

tion to the following cross-question propounded to one of respondents' witnesses: "Why do you say the damage was \$50 an acre, rather than \$40, \$60, or \$75?" This witness had already stated the elements of damage to the land not taken, as he deemed them to exist, as a basis for the opinion he had expressed; and the court sustained the objection upon the theory that, having done this, he had already answered the question. Counsel insist, however, that the purpose of this question was to ascertain "what was the effect of these elements of damage on the market price." when the witness stated \$50 an acre, he had given his judgment of the effect. It would have been proper to cross-examine him in regard to his knowledge of the value of farm land, and of the effect upon that value of extending a railroad across the farm, for the purpose of testing his knowledge and his qualifications as a witness, but we think the objection to the question now under consideration was properly sustained.

Petitioner asked 37 instructions. Objection is made to the action of the court in refusing 13 of these, and in giving four of those given at the request of the respondents. Of those refused, the 24th, 26th, 27th, 28th, 30th, 32d, 33d, and 34th, state propositions that are found in other instructions given, and their refusal, therefore, was proper. The 29th attempted to state that the jury should not discriminate against the petitioner on account of the fact that it was a railway corporation. The language used was misleading, and the instruction rightfully refused for that reason. The 31st would have advised the jury that the purposes for which the land is adapted or may be used are immaterial, unless such purposes actually effect the present cash value of the property. The 35th was, in substance, that the danger to persons crossing and recrossing the proposed tracks is so remote that it does not form a proper basis for the assessment of damages. The 36th is to the effect that the law requires the petitioner, in the operation of its railroad, to use the most improved contrivances to prevent the escape of fire, and that it would be responsible for damages occasioned through any negligence in that regard, and that the jury, in arriving at their verdict, should not consider any loss or damage that may accrue from such negligence. The 37th is that, in arriving at their verdict, the jury should not average the testimony of the witnesses on the question of land damages and values. These four instructions last discussed, being appellant's instructions 31, 35, 36, and 37, should each have been given.

By appellees' given instructions which are criticised, the jury were instructed that they might consider all the facts which contribute to produce damage to the land not taken, if shown by the evidence; and the instructions then enumerate certain things which, if shown by the evidence, the jury may consider. The objections are (1) that these instructions each amounted to telling the jury that these particular things occasioned damage, as a matter of law, while whether or not they did occasion dam-

Philadelphia, etc., R. Co. v. Devers

age was a question of fact to be determined by the jury; and (2) that the instructions single out specific elements of damage, and thereby emphasize and give undue prominence to those particular elements. So far as the first objection is concerned, it is based upon a misapprehension of the instructions, as each submits to the jury the question whether the things enumerated would damage the land not taken. A discussion of either objection is fruitless, however, as an instruction of the same character as each of those under consideration, and almost identical in language with one of them (No. 16), was held by this court to be a proper statement of the law in each of the three following cases: *Chicago, Peoria & St. Louis Railway Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Chicago, Peoria & St. Louis Railway Co. v. Blume*, 137 Ill. 448, 27 N. E. 601; and *Chicago, Peoria & St. Louis Railway Co. v. Greiney*, 137 Ill. 628, 25 N. E. 798.

It is unnecessary to determine whether the verdict was excessive in amount.

The judgment of the county court will be reversed, and the cause remanded to that court for further proceedings in harmony with the views herein expressed. Reversed and remanded.

PHILADELPHIA, B. & W. R. Co. v. DEVERS.

(Court of Appeals of Maryland, June 20, 1905.)

[61 Atl. Rep. 418.]

Master and Servant—Duties of Master—Safe Place to Work—Delegation of Duty.*—A flagman was provided by the railroad with a watch box, which was placed between two tracks. During his absence it was moved temporarily by other servants of the railroad to be repaired, and on being replaced was put too close to one of the tracks, in consequence of which it was afterwards struck by a train, and the flagman was injured. Held, that the box was an appliance or place which the railroad was personally bound to exercise reasonable care to construct and maintain in a safe condition, and it was liable for the negligent replacement of the box by a fellow servant of the flagman.

Same—Negligence of Master—Instructions.—In an action for injuries to a railroad flagman, caused by his watch box being placed in an improper position, a charge hypothesizing the unsafe and dangerous position of the watch box, in consequence of which plaintiff was injured, submits to the jury the question of the railroad's negligence.

Same—Assumption of Risk—Unknown Dangers.†—A railroad flagman who is supplied with the watch box assumes the risks that are

*For the authorities in this series on the question as to what are the nonassignable duties of a railroad company as a master, see foot-notes appended to *Richey v. Southern Ry. Co. (S. Car.)*, 14 R. R. R. 526, 37 Am. & Eng. R. Cas., N. S., 526.

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-notes appended to *Foster v. Chicago, etc., Ry. Co. (Iowa)*, 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; foot-note appended to *Chicago, etc., Ry. Co. v. Barnes (Ind.)*, 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; foot-notes appended to *Woods v.*

Philadelphia, etc., R. Co. v. Devers

incident to the use of such a box properly located, and such other risks as he knows, or should know by the exercise of reasonable care, to exist, but does not assume the risk that the watch box has been placed without his knowledge so close to the track as to be liable to be struck by a passing train.

Appeal from Circuit Court, Cecil County; Edwin H. Brown, Judge.

Action by James Devers against the Philadelphia, Baltimore & Washington Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, PAGE, SCHMUCKER, and JONES, JJ.

L. Marshall Haines and *Austin L. Crothers*, for appellant.
Joshua Clayton, for appellee.

PAGE, J. The facts of this case are as follows: The appellee was a flagman in the employ of the appellant at the crossing of a street over its railroad in the city of Chester, in the state of Pennsylvania. His duty was to watch for passing trains, and give notice thereof to persons passing along the highway. For the better performance of his duty, the appellant provided him with a watch box, where he could find shelter when not obliged to be upon the track. He had been so employed for more than seven years. Three tracks, two of them main and one a siding, there crossed the street. The box was placed between the two main tracks. It was about eight feet high, four feet across, and weighed three or four hundred pounds. It had been in use several months. On the morning of the accident it had been moved temporarily, by the employees of the appellant, from its foundation, for the purpose of being repaired. The appellee, whose term of service was at night, was absent while the repairs were being made. He returned to his work before the repairs were fully completed, but after the box had been moved back to the place where it belonged. There was testimony tending to show that it was replaced apparently in its original position with relation to the location of the track, and no change was observable other than that the step had been removed and some alteration had been made in its structure. He testified that on his return he noticed no change in the location of the box. It was "apparently in the same position"; far enough away not to be hit; as far as he could see, it was "in a safe place"; he "didn't think of injury." It was also in testimony that the appellee,

Northern Pac. Ry. Co. (Wash.), 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365; *Murphy v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 346, 37 Am. & Eng. R. Cas., N. S., 346; *Foster v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; *Meehan v. Holyoke St. Ry. Co.* (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; foot-notes appended to *Shaw v. Manchester St. Ry.* (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

Philadelphia, etc., R. Co. v. Devers

when he arrived at his place, was about to enter the box to leave his kettle and other things needed by him during the night, when the box was struck by a passing engine, and the injury of which he complains was inflicted. At the close of the trial the appellant excepted to the action of the court upon the instructions asked for by the respective parties.

The substantial question in the case is whether this watch box, under the circumstances of this case, falls within the familiar rule that requires the master to exercise all reasonable care to provide and maintain proper and safe machinery, appliances, and places for his employees, and that such duty he cannot avoid by showing that he has used reasonable diligence in the selection of his agents to perform the work. In such a case the negligence of the servant to discharge this duty would be a negligence imputable to the master, for which he would be responsible, and this is so because there rests on the master a positive duty which he cannot delegate. These principles are too well settled to require further statement or citation of authority. They are sustained in the following cases: *Russell's Case*, 88 Md. 571, 42 Atl. 214; *Jamar's Case*, 93 Md. 412, 49 Atl. 847, 86 Am. St. Rep. 428. But the appellant contends that the watch box ought not to be considered as a structure or appliance, or "a place in which to work," but must be regarded as "a structure used as incidental to the work." The distinction thus sought to be made in order to relieve the master of his obligation, we think is more fanciful than real. It is certainly not borne out by any of the cases cited to support it. *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 69, 34 Am. Rep. 291; *Maryland Clay Co. v. Goodnow*, 95 Md. 330, 51 Atl. 292, 53 Atl. 427; *American Tobacco Co. v. Strickling*, 88 Md. 500, 41 Atl. 1083. In the first and second of these cases the master was held liable because the servant, after he became aware of the defects in the machinery, voluntarily continued in the service. In the *Strickling Case* it was held negligent to permit a rapidly revolving shaft to remain unguarded without warning to one who was inexperienced and ignorant of the danger to those coming in contact with it. In *Goodnow's Case* the decision of the court turned upon the fact that the injury was caused solely by the negligent selection and use by a fellow servant of a car without a good brake, when there had been provided other cars with safe brakes, which might have been selected and used. So that none of these cases, and none other to which we have been referred, are applicable here. On the other hand, it seems to be difficult to assign any good reason why this box should not be regarded as a structure or appliance or place assigned by the appellee, proper to be occupied in the discharge of his duties as a watchman of the crossing. The service assigned for him to do was to notify persons of the approach of passing trains. When actually engaged in thus giving notice it is true his duty would call him out of the box on the road, where he

Philadelphia, etc., R. Co. v. Devers

might more efficiently notify those passing the highway; but when he was not so engaged on the crossing he was furnished with the box as a needed shelter from the weather. It was a provision made by the company for his protection and comfort while engaged in its service, and it was a necessary appliance for the proper discharge of his duties. It was the proper place for him to be when not actually engaged in waving his flag or performing some other proper service outside. It was placed there for that purpose, and the company expected him to so use it.

In this view of the matter it might be correctly said that the appellee was as much engaged in the business of the company while using the box in the manner the company intended it should be used as he could be while outside upon the street waving his flag. It was the duty of the company to take reasonable and proper precautions to make it safe, and it was a duty it was bound to perform. It cannot, then, be maintained that, if the box was originally not unsafe when it became out of repair, the company would have discharged its full duty if it did no more than intrust to a competent servant the job of restoring it, even though it used due care in the selection of such employee. There is no contention here that the repairs to the structure were the cause of the accident, but that in replacing it it was located too near the track, so that it was struck by a passing engine, whereby the appellee was thrown over and injured. The proof shows that the box, when replaced, was located too close to the track, and was thereby brought within reach of the passing engine. It was the clear duty of the company to construct and maintain this structure in a safe condition, so that it could be safely used. The duty of maintaining, as well as of constructing, suitable and sound appliances, rests upon the master himself, and he cannot subject his employees to risks beyond those which are incident to the employment contemplated at the time of the contract of service, and the employee may presume that this duty has been discharged. *Stricker Case*, 51 Md. 47, 34 Am. Rep. 291; *Baker Case*, 84 Md. 19, 35 Atl. 10. The plaintiff's prayers are in accordance with this principle, and were properly granted. The objection to the first prayer—that it does not properly submit to the jury to find the appellant's negligence—is not well taken. It requires it to find that the position of the watch box was unsafe and dangerous, and, in consequence thereof, the plaintiff was injured, etc. The appellee, in accepting the employment of flagman, took upon himself only the risks incident to the service known to him, or discernible by ordinary care on his part. He assumed the risks that were incident to the use of a box properly located, and such others as he knew, or ought to have known by the exercise of reasonable care; but he did not assume the risk of a watch box placed, without his knowledge, so close to the track as to be liable to be struck by passing trains. A watch box so placed is a dangerous structure. As it stood at the time the appellee was injured, it was a constant menace to those whose

Moore v. St. Louis, etc., Ry. Co.

duties required them to use it. As was said by the United States Supreme Court in *Railroad v. McDade*, 191 U. S. 67, 24 Sup. Ct. 24, 48 L. Ed. 96, where the structure was an overhanging spout, "it was so devoid of all exigencies of expense, necessity, or convenience, so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe is a conviction of negligence." After a careful examination of the whole record, we are of the opinion the case was properly submitted to the jury.

Judgment affirmed.

MOORE et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Louisiana, June 19, 1905.)

[38 So. Rep. 913.]

Employment of Minor as Brakeman.—A railway company is not at fault in employing as a brakeman an intelligent young man, 19, who has the appearance of being 22 or 25, years of age, in the absence of any objection from his parents or tutor.

Injury to Brakeman—Assumption of Risk—Going between Moving Cars.*—An experienced brakeman, who, in violation of a rule of the company employing him, and of specific instructions, voluntarily and unnecessarily goes between the moving cars of a train, assumes the risk of the consequences.

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; Luther Egbert Hall, Judge.

Action by Sallie Moore and another against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Andrew Augustus Gunby, for appellants.

Hudson, Potts & Bernstein, for appellee.

Statement.

MONROE, J. Plaintiffs allege, in substance, that their son, who was nearly 19 years of age, and was employed as a brakeman, was killed, through the negligence of the defendant, upon the 29th of October, 1903; that about 4 o'clock upon the morn-

*As to contributory negligence and assumption of risks where railroad employees fail to comply with rules and instructions, see foot-notes appended to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621, where all the preceding authorities in this series are collected or referred to.

As to the risks assumed by those coupling or uncoupling cars, see foot-notes appended to *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349; *Murphy v. Grand Trunk Ry. Co.* (N. H.), 14 R. R. R. 521, 37 Am. & Eng. R. Cas., N. S., 521.

Moore v. St. Louis, etc., Ry. Co

ing of that day "the engineer was backing a train of freight cars onto the scale switch track, and the said William Burton, their son, was directed by the conductor in charge * * * to uncouple the cars as they were backed to the scale track for weighing, and whilst so engaged his foot was caught in the switch, which had been improperly opened, and he was run over by the trucks of the freight car, * * * inflicting injuries from which he died; * * * that, in order to uncouple said cars, Burton had to go in between two cars while they were moving, * * * at a point where the scale track switched from the main track, and where the danger is necessarily greater than at any other point; that it was dark and cloudy, and impossible for him to see the opening of the switch; that there was no switch light burning, and no lights in the yards of the company"; that he was not notified of these dangers, and was not aware of them or capable of comprehending the same; that he was a minor, incapable of entering into contractual relations, and that defendant had no right to employ him; that the conductor was standing near, and saw him enter between the cars, without warning him, and permitted and ordered him to attempt to discharge the dangerous service of uncoupling said cars in the dark; that it was the duty of the defendant to keep its yards and switches well lighted, and the failure to do so was negligence; and they make further allegations as to the quantum of damages.

Defendant denies generally the allegations of the petition, and alleges that the injuries sustained "by plaintiffs' deceased relatives, employee of the defendant company, were due to his negligence and to the risks necessarily incident to the employment voluntarily engaged in by him."

The transcript contains the admission that William Burton came to his death on the morning of October 29, 1903, from injuries caused by his being run over by the truck of a freight car while weighing cars in the defendant's yards at Monroe. Beyond this, the facts, as we find them from the evidence, are as follows: Daniel Burton and Sallie Moore, his wife, parents of William Burton, separated in 1889, since which time the former, who leads an unsettled life as a roustabout on river boats, has exercised no control over his son. He testifies that the latter has worked for himself since he was able to go about; that (speaking of his son as at the time of his death) he was intelligent and mature in appearance—looked like a man; and that, being informed that he was employed by the defendant as a brakeman, witness did not object, because his son had to make a support, and he (witness) thought he was making an honest living.

Sallie Moore, after separating from Burton, married again, after which her son William Burton never lived with her. For eight years preceding his death she had lived in Vicksburg, and he in Monroe, and for two years prior to his death she had not seen him. She had known for about two months that he was

Moore v. St. Louis, etc., Ry. Co

working for the defendant, and had made no objection, because, as she says, the defendant had no agent in Vicksburg. Her son contributed to her support.

At the time of his death, William Burton, according to the testimony of his parents as to the date of his birth, lacked about two months of being 19 years old, and was quite competent to support and take care of himself. He had the appearance of a man of from 22 to 25 years of age, and there is nothing to show that the defendant knew or had any reason to suppose that he was a minor. He had been working for defendant for about 9 months, and was considered a competent brakeman. When the accident occurred, he, with the train crew to which he belonged, was engaged in weighing freight cars on a scale situated on what is called the "scale switch track" in the defendant's yards at Monroe. A car had been placed on the scale and weighed, and was to be removed by being attached to a freight train, consisting of a locomotive and some 15 cars. The crew engaged in the work were the engineer and fireman, the conductor, the head brakeman, and Burton. It was dark, and each of the three last-mentioned was provided with a lantern to enable him to see and to signal. Burton was near the scale, and it was his duty to signal for the train to back, and, at the proper moment, for it to stop, and his signals were to be repeated by the head brakeman, who was several car lengths away, in the direction of the locomotive; the idea being that the train should back until the rear car should couple automatically with the car standing on the scale; that Burton should then couple the air pipes or hose of the two cars by pressing their ends together, after which the train should move out, taking with it the weighed car. The cars were provided with automatic couplers, which could be uncoupled by means of levers from the sides of the cars, so that it was unnecessary for the brakeman to go between them either to couple or to uncouple. The air pipes, conveying the air by which the brakes were controlled, hung down over the middle of the tracks, from the end of each car, to about 10 or 12 inches from the ground, and in order to couple them it was necessary for the brakeman to go between the cars, and, taking a pipe in each hand, press the ends together. The uncontradicted evidence is that, according to the rule of the defendant, and to the instructions given to the employees generally, and to Burton specifically, no one was to go between moving cars for any purpose whatever, but, when it became necessary to get into that position, should do so only when the cars were standing still. A moment before the accident, Burton signaled, with his lantern, for the train to back, which it did, at the rate of about two miles an hour. A moment later the head brakeman, observing that Burton's lantern had disappeared, and perhaps hearing a cry from him, signaled for the train to stop, which it did immediately. Upon investigation, Burton was found with his body lying upon the outside of the track, and his legs crossing to the inside, and one

Moore v. St. Louis, etc., Ry. Co

of them so tightly wedged between the rails of the switch and main tracks that it was necessary to use a crowbar or some similar instrument to extricate him. He died within an hour or two, without explaining how it happened that he got into that position, and no one else has explained it. The end car of the backing train was found coupled by the automatic couples to the car on the scale, and the air pipes between the two cars were also coupled. Burton had been run over by the forward truck (as the train moved) of the end car of the train, and the train had moved but about 4 feet afterwards. Neither the conductor, who was some 50 feet away, nor the head brakeman, who was at a greater distance, had seen Burton go between the cars. There was but little light in the yard, and (though testimony on this subject was objected to) the rails were not "blocked." These are about all the facts disclosed by the record, save that one of the shoes of the deceased was badly torn, either from having been forced between the rails of the switch and main tracks, or in the effort to extricate it from that position.

Opinion.

The proof does not, on material points, sustain the allegations of the petition. The deceased was not engaged in uncoupling cars at all, nor can it be said that he was engaged in coupling them, save that his duty was to stand near where the cars (the end car of the train and the car on the scale) were to come together (coupling automatically), and signal to the engineer to back or move forward as the occasion required. Nor is there any evidence going to show that the switch had been improperly opened. Whether his foot was caught between the rails before he fell, or was knocked down, no one can say. It seems to us more likely that, having stepped in between the moving train and the standing car for the purpose of coupling the air pipes, and having accomplished his mission, he fell or was knocked down in attempting to get out, and that his leg and foot were forced into the position in which they were found by the flanges of the wheels which ran over them. In any event, the testimony is direct and uncontradicted to the effect not only that it was unnecessary for him to go between the cars whilst they were in motion, and no part of his duty to do so, but that there was a rule of the company and that he was instructed to the contrary. Under these circumstances, we are constrained to hold, as we assume the trial judge held, that the injury complained of resulted from the assumption by the deceased of a risk that he was not called on to assume and had been instructed not to assume, and not from the negligence of the defendant. Beyond this, although technically he was a minor, the deceased was sufficiently intelligent and had had sufficient experience to justify his employment, even had it been shown that the defendant was aware of his minority.

Judgment affirmed.

SOUTHERN RY. CO. *v.* LOGAN.

(Circuit Court of Appeals, Fourth Circuit, May 9, 1905.)

[138 Fed. Rep. 725.]

Master and Servant—Injury of Servant—Assumed Risk.*—Plaintiff, who was employed as a conductor in the switchyards of defendant railroad company, in taking a dining car to a Y at a junction about a mile from the yards, in the nighttime, for the purpose of turning the same, placed the engine behind; leaving no light in front of the car, except a lantern, which he held in his hand while standing on the front platform. Other engines and trains were frequently on the tracks at the junction, and it happened on this occasion that an engine which had left its train on the Y was backing up to a coal chute, and a collision occurred between the tender and the dining car, in which plaintiff was injured. Held, that it was error to instruct the jury that plaintiff could recover, although the placing of the engine behind the car, instead of in front, was more dangerous, if they found that he did so by direction of the yard master, who was his superior, since, even in such case, being familiar with the additional risk involved, he assumed the same, and could not charge defendant with liability for its result.

In Error to the Circuit Court of the United States for the District of South Carolina.

C. P. Sanders, for plaintiff in error.

Jos. A. McCullough, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PRITCHARD, Circuit Judge. The defendant in error, who was a yard conductor in the service of the plaintiff in error at Spartanburg, S. C., brings this action to recover the sum of \$20,000 for damages received by him while in charge of a "diner" which had been left at Spartanburg for the purpose of being turned, in order that it might be ready for the train which was due to pass Spartanburg at 7 o'clock each morning. In order to turn this car, it was necessary to take it to the yard of the plaintiff in

*For the authorities in this series on the subject of assumption of risks in doing dangerous work in obedience to orders, see foot-notes appended to *Weed v. Chicago, etc., Ry. Co.* (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797; *Stewart v. Texas & P. Ry. Co.* (La.), 13 R. R. R. 158, 36 Am. & Eng. R. Cas., N. S., 158; extensive note appended to *Illinois Cent. R. Co. v. Jones' Adm'r* (Ky.), 12 R. R. R. 272, 35 Am. & Eng. R. Cas., N. S., 372.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-notes appended to *Woods v. Northern Pac. Ry. Co.* (Wash.), 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365; *Foster v. Chicago, etc., Ry. Co.* (Iowa), 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; *Chicago, etc., Ry. Co. v. Barnes* (Ind.), 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; *Foster v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; *Meehan v. Holyoke St. Ry. Co.* (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; *Shaw v. Manchester St. Ry.* (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

Southern Ry. Co. v. Logan

error, which was situated at the junction of the Asheville & Spartanburg Railroad with the main line running from Charlotte to Atlanta. The Y was a little over one mile from Spartanburg. The defendant in error was charged with the duty of turning the diner, and, in doing so, used a switch engine which was furnished him for that purpose. This engine was provided with a headlight at each end, which was put there to enable the engineer to see obstacles on the track in time to prevent a collision. The defendant in error had complete control over the movements of the engine and dining car between Spartanburg and the Y. In going from Spartanburg to the junction Y, it was necessary that the operator at Spartanburg should notify the operator in the office of the plaintiff in error at the junction yard to hold the engines and trains at that point until the engine and cars leaving Spartanburg should arrive. This office is situated at the northern end of the junction (the end nearest Spartanburg), while the Y was at the southern end of the junction yard (the end nearer Greenville). On the night in question the operator at Spartanburg notified the operator at the junction yard to hold the engines and cars until the defendant in error in charge of the diner should arrive at that point. On arriving at the office, the defendant in error, as conductor in charge, failed to report before proceeding beyond that point. After leaving this point, the defendant in error, while in charge of the diner and engine, signaled the engineer to go at a greater rate of speed. This signal was repeated twice. The engine had been placed in the rear of the car, and the defendant in error was standing on the platform in front of the diner, with no light except his hand lantern. On the night in question an engine of the plaintiff in error, which had left its cars at the Y, was on the main line, and was running back towards the coal chute, and while running in this manner the engineer suddenly became aware of the approach of the dining car. He at once reversed his engine, but before he could start in the opposite direction the dining car struck the tender, which resulted in the injury to the defendant in error.

It is contended by the plaintiff in error that the court erred in using the following language in its instruction to the jury:

"* * * But under that testimony, if you believe that the yard master instructed him to move the engine in that way, the car being in front, although you might conclude that that was not the safest way to do it—it was clear that it was not the safest way—yet, if the yard master instructed him to use it that way, then no negligence can be imputed to him for using the engine in that manner; the yard master being superior in authority to the conductor. * * *"

There was evidence which tended to show that the defendant in error, in pushing the car in front of the engine, did so under the orders of the yard master. It was also in evidence that the movements of the car and engine were directly under his control

Southern Ry. Co. v. Logan

ing the diner from the various points on the yard in the nighttime. He knew that after he passed the junction office the car was on a track which was frequently used by other engines and cars, and the manner in which he carried the diner over this particular portion of the track, with nothing but a lantern to indicate his approach, was attended with great hazard. Notwithstanding such knowledge on his part, he failed to report his arrival at the junction yard; and, after passing that point, instead of keeping his car under control, he signaled the engineer for a greater rate of speed, and although the engineer responded, and increased the rate at which they were going, he again signaled for more speed, and, as a result of such negligent conduct on his part, the car was moving so rapidly that it was a physical impossibility for the engineers to stop their engines in time to prevent the collision which occurred.

It has been repeatedly held that when one assumes employment at railroad yards, where there are many side tracks, and where trains and engines are constantly passing, he assumes the risk incident to the employment in which he is engaged. In the case of *Randall v. B. & O. R. Co.*, 109 U. S. 482, 3 Sup. Ct. 325, 27 L. Ed. 1003, it is said:

"A railroad yard, where trains are made up, necessarily has a great number of tracts and switches close to one another; and any one who enters the service of a railroad corporation, connected with the moving of trains, assumes the risk of that condition of things."

In the case of *Tuttle v. Milwaukee Railway*, 122 U. S. 194, 195, 7 Sup. Ct. 1168, 30 L. Ed. 1114, it is also said:

"It is for those who enter into such employments to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employees have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed."

Judge Cooley states the rule as follows:

"The rule is now well settled that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself. The reason most generally assigned for this rule is that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he will be exposed to the incidental risk, he must be supposed to have con-

Smith v. Fordyce

pany is not bound in its duty toward its servants to adopt every new invention, although it is an improvement; but it is merely its duty to use reasonable care in procuring and keeping its appliances in good condition.

Same—Question for Jury.—In an action for injuries to a car repairer from the escape of a car from a switch track, held a question for the jury whether defendant should have had a derailing switch at the junction of the switch track and that where the accident happened.

Same—Assumption of Risk.—A car repairer at work on a car on the main line of a railroad does not assume the risk of injury from a car escaping from a switch track and running onto the main line.

Same—Trial—Instructions—Requests.—Where defendant, in an action for injuries to a servant, desires to have the question of assumption of risk submitted to the jury, it is his duty to pray an instruction to that effect.

Same—Negligence—Evidence—Competency.—In an action for injuries to a car repairer by a car escaping from a switch track onto the track where he was at work, it was competent to show the absence of a derailing switch at the junction of the switch track and the other track, and that such a device was in common use by defendant.

Same—Knowledge of Witness.—In an action for injuries to a servant employed by a railroad, a witness was properly permitted to testify as a practical railroad man engaged in the construction and repairing of tracks, and having three years' experience, as to the purpose of a derailing switch and as to where one should be placed.

Same—Proximate Cause—Concurring Negligence.—Where a railroad company failed to provide a derailing switch at the junction of a switch track and the main track, and a car was set out on the switch track, which was downgrade, and the brake was loose, the car being blocked and the brake wheel so obstructed with timbers that it could not be reached, and employees of a mining company which used the switch track negligently moved the car, whereby it ran onto the main track, injuring a servant, the negligence of the mine employees did not relieve the railroad of responsibility for the proximate cause of the injury.

Personal Injuries—Measure of Damages—Instructions.—Where, in an action for personal injuries, the court instructed that in finding for plaintiff the jury might allow him such damages, not exceeding the amount claimed in the petition, as they believed he had sustained, the instruction was not objectionable for failing to give the elements of damage; no instruction on such matter having been requested by defendant.

Same—Excessive Damages.—In an action for injuries to a strong and active man of 26 years, whereby he lost the use of his left arm, a verdict for \$7,500 was not excessive.

foot-notes appended to *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; *Glasse v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; foot-notes appended to *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, B. & N. O. R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

For the authorities in this series on the subject of the application of the doctrine of concurrent negligence, see foot-note appended to *French v. Grand Trunk Ry. Co.* (Vt.), 13 R. R. R. 426, 36 Am. & Eng. R. Cas., N. S., 426; foot-notes appended to *Memphis St. Ry. Co. v. Haynes* (Tenn.), 13 R. R. R. 384, 36 Am. & Eng. R. Cas., N. S., 384.

Smith v. Fordyce

that on the —— day of October, 1899, one of the freight cars operated by the defendants as receivers had become out of repair, and the same was attached with their train on the track so operated by said receivers at or near said station on said railroad, and it was the duty of plaintiff to go to said car and under the same for the purpose of repairing it, so that it could be used by defendants in the transportation of freight over said road; that in pursuance of his duty he went upon said track and under said car for the purpose of repairing the same; that, while he was at work performing his duty as repairer as aforesaid, a car that had been placed at said mine by said receivers and negligently left in a position so that it was allowed to run down said switch, and in such condition that it could not be managed or controlled, started and rolled down said switch, increasing its speed as it went, until it reached the main line of said road under great speed, and on account of the negligence of the defendants in failing to have a derailing switch as aforesaid, or using other means at the point mentioned to prevent said car from rolling on said track with great speed, and on account of the negligence of defendants in leaving said car in said situation and condition, it ran with great force into the train to which the car which plaintiff was repairing was attached, and caused the car that plaintiff was repairing to run over plaintiff, thereby breaking and mangleing his left arm, so that about four inches of bone next to the shoulder had to be removed, and leaving the plaintiff permanently injured for life; that plaintiff suffered great pain in body and mind from said wound and injury, and has ever since been unable to perform labor, and will always be permanently injured; that the defendant the Kansas City Southern Railway Company has become the purchaser under the order of said court of all the property of said Kansas City, Pittsburg & Gulf Railroad Company, and as a part of said purchase price the said defendant assumed the obligations of said receivers to this plaintiff. Wherefore he prays judgment for ten thousand dollars and costs.” The answer was, first, a general denial; second, an assumption of the risks by said plaintiff of said injuries; third, that the said car which collided with the train under which plaintiff was working was set in motion by the acts of third parties over whom defendants had no control, without the knowledge or consent of defendants or either of them. Plaintiff’s reply denied all the new matter set up in the answer. The cause went to trial, and a verdict was rendered on the 23d of January, 1902, in favor of plaintiff, for \$7,500. At the same term of court motions for new trial and in arrest of judgment were filed, heard, and overruled, and defendants duly excepted, and took their appeal to this court.

The evidence developed the facts as follows: That the plaintiff was a young man, 26 years of age at the time he was injured, and as a result of his injuries he had about an inch and a half of the bone taken from his arm between his shoulder and elbow,

Smith v. Fordyce

and that on account thereof he has no use of his arm below the elbow, and it hangs at his side perfectly useless to him. That prior to his injury plaintiff was a car repairer and inspector in the employ of the defendant receivers, and had been so employed about two months, and had had altogether about nine years' experience. At Joplin, where the accident occurred, the yards are very near the station, and a mile and a quarter south of the depot there was a switch track, leading east from the main line to and furnishing switching accommodations to the Bankers' mine, at that time operated by the Missouri Lead & Zinc Company. This switch or spur track had no outlet to the east. Near the middle of it, it was on a level space called "the hump," and from this level space the grade declined both to the east and to the west. The injury to plaintiff occurred on the 23d of October, 1899. On the previous Saturday the defendant's employees had placed on this spur track a car load of timbers which had been shipped to the mining company. These timbers were loaded on a car with side boards. On account of the width of the car and its load, it could not be pushed in on the spur track more than 600 feet from the main line because of the power house or shed, built so near the track that this car thus loaded could not pass. There was evidence on the part of the defendants that, when they set this car out and left it, the brakeman set the brake on it and put a stick of wood under the wheel at the west end. The car remained in this position until the following Monday. On the part of the plaintiff there was evidence to show that the timbers with which the car was loaded were piled up about and over the brake, so that the servants of the mining company, when they went to move this car, could not work the brake or twist it at all, because the logs were on it, and that it was not set. It seems that on Monday the mine superintendent, wishing to get the car past the coal bin and further east, telephoned the railroad company to send a switch engine to move the car; but there was delay in sending the switching crew, and so the superintendent of the mining company sent his own employees to move the car west, though one of the witnesses said they intended to move it east, so that the track could be moved and adjusted further from the obstructing building. Some four or five of these mine employees, armed with crowbars and pinch bars, went to this car to move it. One of them kicked the stick of wood from under the wheel, and the car started slowly down the switch towards the main line. One of the employees then got on the car and attempted to use the brake, but found the brake was covered with the timbers so that it could not be used. They then attempted to stop the car by throwing sticks of wood in front of the wheels; but this proved unavailing, and the car continued to run down the switch, increasing its speed as it went, and passed onto the main line, and then onto a switch where a freight train was standing, one of the cars of which the plaintiff was at that time repairing, and struck this train and caused one of the cars to

Smith v. Fordyce

the plaintiff, inflicting the injuries for which he brings on. There was evidence offered by the plaintiff tending that the defendant company had in use along this road points of this character a device known among railroad as a "derailing switch," which is adapted to the purpose of moving cars, when escaping from one of these switches, from out on the main line or track, and evidence showing that this device or derailing switch had been provided for this road and no other device to prevent cars escaping on this road from coming onto the main line. There was also evidence to show that the employees of this mine had been in the habit of moving cars on this switch backwards and forwards, and that the company knew they were in the habit of so doing, as at one place would be found 200 yards distant when the company wanted to get them again.

At the close of the evidence the court gave the following instructions for the plaintiff: Instruction No. 1: "The court instructs the jury that it was the duty of the defendants to furnish the plaintiff a reasonably safe place in which to perform his work, regard being had to the nature and character of his employment and the kind of work he was engaged in; and it was also the duty of the defendant to keep its tracks, switches, and cars in a reasonably safe condition, so that plaintiff could perform his work about them in reasonable safety, regard being had, as stated, to the nature of his employment. And if the jury find from the evidence that on the 23d day of October, 1899, or some time prior thereto, the defendants had a switch running from the main line of their road, near the station at Joplin, at a place known as the 'Bankers' Mine,' and that cars left standing on said switch by the defendants, their agents or employees, were liable to escape from the persons moving the same, without the knowledge and consent of the defendants, and run down onto the main line, and out on the main line of said road and other tracks at said station, then it was the duty of the defendants to exercise ordinary care and precaution to have so fixed its switches and cars on the same, if the same could be done by exercising reasonable care, so that if a car did escape on said switch and run down said switch, and out onto the main line and other tracks of the defendant, if the jury believe by so doing it would endanger persons rightfully on said track or switches, the jury believe from the evidence in this case that the defendant, under the direction of the conductor in charge of a train belonging to the defendants, and standing on a track at the station at Joplin, went under said train for the purpose of repairing a car therein, and that in so doing he was exercising ordinary care and caution, and that prior thereto the defendant, while operating said railroad through their servants or employees, had left a car standing on said switch at said mine, and that said car was left there without the brake being set, or

Smith v. Fordyce

there was no such negligence, then your verdict must be for the defendant."

The refused instructions will be noted in connection with the assignments of error. At the close of all the evidence the defendants interposed a demurrer to the evidence, which was overruled by the court.

1. The stress of the argument for a reversal of the judgment in this case is that the demurrer to the evidence should have been sustained, because there was a total failure of proof of the cause of action alleged, and not a mere variance, which was not a surprise to defendant. The petition by way of inducement avers the ownership by defendants of a switch track leading from its main line near Joplin to a lead and zinc mine, known as the "Bankers' Mine," which they used to haul cars of coal and other supplies to said mine, and that from the place where said cars were left at said mine to be unloaded said switch track was downgrade to the main line, so that cars left standing on said switch track at said mine, unless fastened in some way, would run down to and on the main line track and other switches with great force and speed, thereby endangering the lives of the employees of defendants engaged in work on said main line and passengers on said railroads; that it was the duty of said receivers to place said cars at said mine on said switch so that the same would not become loose and roll down to the main line, and to have placed at or near the intersection of said switch with the main line what is commonly known as a "derailing switch," or some other means of obstruction, so that, if the cars did escape from said switch at said mine and roll down to the main line, they would not run out to the main line, but would be stopped or derailed. Having then alleged that plaintiff on the ——— day of October, 1899, in pursuance of his duty as car repairer for defendants, went under a car of defendants, attached to one of its trains on its track near Joplin, to repair the same, it is averred that while so engaged "a car that had been placed at said mine by said receivers and negligently left in a position so that it was likely to run down said switch, and in such condition that it could not be managed or controlled, started and rolled down said switch, increasing its speed as it went, until it reached the said main line of said road under great speed; that on account of the negligence of the said defendants in failing to place a derailing switch or using other means at the point mentioned to prevent said car from rolling on said track with great speed, and on account of the negligence of defendant in leaving said car in said situation and condition, said car ran with great speed and force into the freight train to which that car that the plaintiff was repairing was attached, and caused the same to run over plaintiff, thereby breaking his arm." The contention is that by the foregoing allegation the plaintiff charged an injury due alone to the fact that the car on the mine switch, without human agency, got loose and rolled of its own accord down the switch

Smith v. Fordyce

and onto the main track, and thence to a place which plaintiff was repairing, and that the evidence is entirely different state of the facts; that plaintiff in chief merely testified as to what he saw when the accident happened, and to the extent of his knowledge of the starting of the car or the cause of the testimony of Mr. Eagan, for the plaintiff in support of the petition, because he testified that the mining company went to this car with the intention of so they could fix the track, and thereby get the car out of the house; that he found the car blocked and that he moved this block, and that on this account of the men assisting him the car was set in motion and it started these employees of the mining company to stop either with the brake on the car or with the wheels which they threw in front of it to check it. The plaintiff's own evidence proves an entire change of action than that alleged by him, and that the defendants in a safe and secure position by the act of third parties without the fault of defendants, just as they alleged in their answer. It is of this position defendants cite us to the authorities and by this court that it is fundamental that the cause of action stated in the petition is not supported by the facts in evidence in this case show that the cause of action stated in plaintiff's petition was untrue and meaningless. The rule invoked by defendants is the law of this state, as attested by the authorities: *Wheeler v. Railway Co.*, 71 Mo. 514; *Weil v. Railway Co.*, 157 Mo. 477; *Hamling v. Metropolitan Co.*, 162 Mo. 75, 62 S. W. 452. If the question arises, then, have the defendants failed to state the petition in the case, and ought the court to grant the demurrer to the evidence on this ground? That the circuit court took a different view of the evidence. By its first instruction for the plaintiff it said "that it was the duty of the defendants to provide a reasonably safe place in which to perform the work being had to the nature and character of the work, to keep its tracks, switches, and cars in a safe condition, so that he could perform his labor at all times with safety; and if the defendants left the switches at said mine without the brake on, so that the brake could not be set or used, and that the defendant knew that the employees were likely to move this car, and left it in motion, and if they did move it, it could not be controlled, and the defendant carelessly failed to put in a derailer or other means to prevent cars while so being in motion on said main line, in case they escaped,

Smith v. Fordyce

son of such negligence said car did roll out on said main line, and struck the train under which plaintiff was working, and thereby injured him, then he could recover." On this point, to wit, the total failure of proof to sustain the allegations of the petition, defendants rest their contention on the fact that the car did not move of its own volition, but remained stationary until the mining crew moved the block from under the wheel, and insist that it was wholly incompetent to show under the petition that the car was started down the switch track by the endeavor of the mining crew to move it back a short distance to the west, whereas the essential averments as to negligence were threefold, to wit: That the car was "left in a position so it was likely to run down said switch, to wit, left standing on the brink of a downgrade in the direction of the main line"; and, second, "in such a condition that it could not be managed or controlled," to wit, left with the brake loose and so covered by the ends of the heavy timbers that those moving it could not get to the brake to set it, so as to check or retard the movement of the car when started; and, third, the failure to have "a derailing switch or other means to prevent the car from going out upon the main track," when once started downgrade, by whatever means it was started. The court admitted testimony to show that the mining crew was endeavoring to move the car back a little to the west, in order that that track might be moved farther away from the power house, and thereby permit the car to be moved on east to the mine, and in this connection offered evidence that it was the custom and habit of the defendants to place loaded cars for the use of the mine on this switch or spur track, and to permit the mining crew to move said cars backwards and forwards thereon for their convenience in unloading the same. That the car was attempted to be so moved did not and could not have misled or surprised the defendants at the trial, because the defendants alleged in their answer that it was set in motion by the acts of third parties, over whom they had no control, without their knowledge or consent. The testimony admitted by the court as to the attempt of the mining crew to move the car was introduced preliminary to the evidence tending to show the three acts of negligence above set out, upon which plaintiff based his right of recovery. That there was any failure of proof to show that the car was located at the brink of the downgrade leading west towards the main track without the brake having been set, and with the brake so covered up with the logs with which the car was loaded, is too plain for discussion. Neither was there any failure to show that there was no derailing switch provided at the junction of this switch with the main track, or any other means to prevent wild cars from running from the switch onto the main track. The evidence of the plaintiff tending to show that the car was set in motion by the mining crew, moreover, was to contradict the allegation in the answer that it was set in motion by third parties, over whom defendants had no control, and without the knowledge and consent of defendants.

Smith v. Fordyce

apparent that it was not the mere starting of the car which was the sole cause of the injury to plaintiff, nor was that relied upon as the sole basis of recovery, but it was the other negligent acts in connection with the starting which contributed to the plaintiff's injury, and his undoing would not have occurred except for the presence and coexistence of these contributing causes. *Lore v. American Mfg. Co.*, 160 Mo., loc. cit. 625, 627, 61 S. W. 678; *Bassett v. City of St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446. It is a settled principle of law in this state that if damage or injury is caused by the concurring force of a defendant's negligence and some other force for which he is not responsible, including "that act of God" or superhuman force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the other or superior force which, concurring with his own negligence, produced the damage. *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808, and cases cited.

Able counsel for defendant earnestly and ingeniously labor to sustain the proposition that plaintiff's cause of action rests entirely upon the allegation that the car started, and supplement the averment with the words "of its own accord"; but in so doing they ignore the three plain assignments of negligence upon which the action is bottomed, in the absence of which no injury would have resulted to plaintiff by the starting of the car which ran off of the spur track onto the main track and collided with the train under which plaintiff was working repairing a car for defendant. In such circumstances the fact that another element of causation intervened, to wit, the attempt of the mining crew to move the car west a short distance to permit the track to be moved far enough from the power house to allow the car to pass on to its destination, the lumber yard of the mine, did not break the legal connection between the brakeless condition of the car and the placing of it on the brink of the sharp downgrade toward the main track and the injury which flowed to the plaintiff. The leaving of a car so heavily loaded on the brow of the downgrade without setting the brake thereon, and covering the brake with heavy timbers so that it could not be used to stop or retard the speed of the car, furnished ample evidence of negligence on the part of the defendants, concurring with the starting of the car by the mining crew, to justify the jury in reaching their verdict. The law imposed upon the defendants the duty of using reasonable care that this heavy loaded car should not be left without brakes set, or so covered up that they could not be used, at the head of this decided downgrade, and they create an unusual or extraordinary risk to its employees and passengers on its main

Smith v. Fordyce

possibility of accident from malicious interference with cars on its tracks, and cite us to *Fredericks v. Railway Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306. It seems quite obvious to us that this argument dehors the record. Here there was ample evidence to go to the jury to establish that this spur track was largely, if not principally, used to accommodate the mine company; that cars were set in on it, loaded with supplies for the mine; and that with the knowledge and acquiescence of defendants the mining company's employees were in the habit of moving the cars backwards and forwards to the place of unloading; and if such was the fact it was not a malicious interference with the car, but something likely to occur and to be expected, and a circumstance to be guarded against by having the brake properly set, or at least in such condition that the mining crew could set it when moving the car, as much so as if its own servants were sent to move it, and the court did not permit a recovery upon the proof alone of the absence of a derailer, nor of the negligent condition of the brake, but required the concurrence of both. Nor did the court assume as a matter of law that it was negligence not to have a derailing switch, but left it to the jury to say whether, in the light of all the circumstances, a derailing switch or other like device should not have been provided.

Learned counsel for the defendants devote much time and space to the enforcement of the proposition that the master is not required to furnish any particular kind of appliances, that he has a right to transact his business in his own way, and, if he sees fit to use machinery of an old pattern, that it is not a matter of complaint for the servant. With this contention the plaintiff refuses to take issue, because he insists that the trial court did not hold to the contrary. The rule is well settled in this state that there is no obligation on the part of the master to furnish absolutely safe appliances, nor is a railroad bound to adopt every new invention, though an actual improvement it may be; but it is the duty of the company to use reasonable care and precaution in procuring and keeping its appliances in good condition and order, and it cannot remain wholly indifferent to the improvements of the day. *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. 937; *Hamilton v. Coal Co.*, 108 Mo. 364, 18 S. W. 977. In these cases it is left to the jury to say whether under all the facts and circumstances it was negligent in the company not to have had a derailing switch at the junction of this switch track with the main track of the defendant's line. There was evidence in this case tending to show that derailing switches were in general use by the defendants on their line of railroad at the time of the injury to plaintiff, and that it was a common device used for the purpose of preventing cars escaping on to the main tracks from switches. The fact that there was no derailing switch was not negligence per se, and it was not so treated by the court. As said by this court in *Jones v. Railroad Co.*, 178 Mo.

Smith v. Fordyce

road, 115 Mo. 111, 21 S. W. 862. But when cars are found running loose and unattended on the main track at a time and place when and where they are liable to cause the wreck of a regular train, it cannot be said that the danger so incurred is one of the usual and ordinary hazards incident to the business. It is not a usual and ordinary occurrence in a prudently managed business for cars to be found running loose in that manner. It does not ordinarily occur, unless some one has neglected his duty; and it is not, therefore, a risk assumed by the servant. * * * It was the duty of the master to use reasonable care to prevent those cars escaping, and therefore, when they are found running loose, so as to imperil the life of the servant who was in the due performance of his duty, the presumption is that the master did not use reasonable care to hold his cars on the side track, and the burden is on him to prove that he performed his duty in this respect. It devolves upon him to explain the occurrence. It was not attempted on the part of defendants to prove that cars with good brakes and the brakes properly set were liable to escape under conditions that might reasonably be anticipated. On the contrary, when confronted with the fact that the side track was not equipped with a derailing switch, the defendant offered evidence to prove, and now contends, that with good brakes, and the brakes properly set, the cars were secure under ordinary conditions. But, if the brakes were not set or the car blocked, they were liable under ordinary conditions to do just what these cars did. Therefore, when it was shown they did escape, the presumption arose that there was something wrong, either with the brakes or the setting." All of which applies with equal force to the facts developed in this case, and the jury have found the brakes were not set, and the car left on the brow of a descending grade to the main track, and that there was no derailing switch. It is clear that plaintiff, who had no notice of the placing of the car or that the brakes on it were left loose and unset, did not assume the risk of its running down upon him while he was engaged in an apparently safe place repairing a car for defendants. The court committed no error in not holding as a matter of law that plaintiff assumed the risk of said loose car running down upon him. And, moreover, this is a civil case, and if defendants desired, after all the evidence was in, to submit the question of fact to the jury, it was their duty to have prayed an instruction to that effect.

We are cited by counsel for defendants to *Fredericks v. Railroad Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306, on the proposition that as the car was started by the mining crew, as they claim, without their consent or knowledge, there was no liability on part of defendants. There is little or no similarity between the facts of the two cases. In the *Fredericks Case* the railroad company established, not only that it had a derailing switch at the junction of the spur track with its main line, but that the cars set on the spur track were provided with proper brakes and

Smith v. Fordyce

they were all tightly set, and that a third person maliciously turned the derailing switch, so that cars from the spur track could run out on the main track, and then deliberately loosened the brake and started the car out on the main track, and that this occurred so shortly before the accident that defendant could not have had notice of it. The jury found that the defendant company exercised all reasonable care to provide against the cars running from the spur track getting onto the main track. That the jury found so found there can be no doubt, but that case is the antithesis of this. Here there was no derailing switch. Here the brakes were not only not set, but so covered with heavy logs they could not be set. Here, instead of the malicious interference of a third person, the mining crew, in endeavoring to move the car back a short distance to move the track, were doing what was daily being done with the knowledge and the consent, or its presumed assent, of the defendant. The two cases could not well be more dissimilar.

2. Error is assigned in the admission of testimony. We have already held that it was competent to show the absence of a throw-off or derailing switch, the fact that such a device was in common use by the defendants themselves on the same road, and the purpose for which such a switch is designed. The evidence was clearly within the issues made by the pleadings.

There was no error in permitting Eagan to testify as an expert railroad man, engaged in the construction and repair of tracks, laying new tracks. It was not necessary that he should have been a scientific railroad man to testify what the proper position of a derailing switch is or where it should be placed. The question is so simple and it is so common that three years' experience in the construction of railroads ought to suffice to enable a man of ordinary intelligence that, if there ever is any such a device, the junction of this spur track with the main track was a proper place for it.

There was no impropriety in permitting Beasley, who was in contract with defendants for loading its cars with gravel, to testify as to how the cars were set in on this spur track and for what purpose, and how he moved the same back and forward in loading them. It tended to disprove the claim of defendant that they did not permit any one but their switching crew to use the engine to move cars on this spur track. It went to show that the defendants did know that parties were moving cars on this spur track from place to place. The objections to the admission of this evidence were properly overruled.

3. The further insistence is that the court erred in not following the defendants' instructions. Of these the fourth and seventh were the court to declare the law to be that, if the accident was caused by the act of the mining company's employees in negligently moving the car, then plaintiff could not recover. They cannot ignore the defendants' own negligence in leaving the cars with the brakes loose and heavily laden on the brink of a sharp curve, and the fact that the mine employees were constantly setting cars in for the mine back and forward on this track.

Smith v. Fordyce

that their negligence, concurring with that of defendants, would not relieve the latter of their responsibility for their own proximate cause of the injury to the plaintiff. The court did not err in refusing them. The fifth and sixth sought to have the court declare as a matter of law that plaintiff could not recover on the ground that defendants had negligently failed to put in a derailing switch at the junction of this spur track with the main line. As already said, whether they were negligent in so failing was left to the jury to find under all the evidence, and consequently no error occurred in refusing them and declaring as a matter of law that it was not negligence to have failed in so doing. We think the case was fairly and well tried and properly submitted to the jury, and their verdict is supported by the evidence.

4. The fifth instruction for the plaintiff reads as follows: "The court instructs the jury that, if they find a verdict for the plaintiff, they may allow him such damages, not exceeding ten thousand dollars, as they believe he has sustained by reason of the injuries, if any, to his left arm, caused by the collision described in the evidence." This instruction is assailed on the ground that it does not define the elements of damage which the jury should take into consideration in arriving at their verdict. No instruction on the measure of damages was asked by the defendants, and no attempt was made by the defendants to point out the proper elements of damages in such a case, or to modify the general language of the instruction given for the plaintiff. In *Browning v. Railway Co.*, 124 Mo. 55, 27 S. W. 644, an instruction was given that if the jury found for the plaintiff, they would assess her damages at such sum as in their judgment would be a fair and just compensation for the loss of her husband, not exceeding \$5,000. In that case, as in this, it was urged that the jury were not properly instructed as to the measure of damages; and *Hawes v. Stockyards Co.*, 103 Mo. 60, 15 S. W. 751, and *McGowan v. Ore & Steel Co.*, 109 Mo. 518, 19 S. W. 199, were relied upon as sustaining the objection. But it was said by this court: "The defendant asked no instruction on the measure of damages whatever. No attempt was made by it to point out the proper elements of damage in such cases, or to modify the general language of the instruction. The instruction is not erroneous in its general scope, and if in the opinion of counsel for defendant it was likely to be misunderstood by the jury, it was the duty of the counsel for defendant to ask for modifications and explanations in an instruction embodying its views. The court is not required in a civil case to instruct on all questions, whether justified or not, and, as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal."

It is urged, however, by counsel for defendants, that that instruction was proper in the case where a widow is suing for the

Smith v. Fordyce

f her husband; but no reason is assigned why a difference should obtain between a case of that character and one of the present one. In *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 2d 100, where the plaintiff sued for damages resulting from a dislocation of her shoulder, and the only direction was that if the plaintiff had become permanently injured, lame, and disabled by such dislocation, the jury would find for the plaintiff a sum not exceeding the amount in the petition. That instruction was challenged because the elements of damages were not stated to the jury, and in answer to that contention it was said: "It is no error that the circuit court did not instruct the jury as to the rule by which they should estimate plaintiff's damages. At this point it is only necessary to remark that this is a general instruction, and mere nondirection is no ground of error in this case. The defendant did not submit any instruction on the elements of damages; neither did plaintiff. If the defendant desired to restrict the jury to certain elements, he should have offered a proper instruction on that subject." The instruction is not confined to the damages sustained by reason of the collision, but, if any, to plaintiff's left arm, caused by the collision as shown in the evidence. The instruction, according to the authorities, was sufficient as a general instruction, and there were no peculiar modifying or qualifying facts, which the defendants desired the jury to take into consideration, and it was their duty to have submitted them in an instruction to the jury.

As to the amount of the verdict itself, the evidence showed that the plaintiff was a young man, 26 years old, strong and healthy, holding a lucrative position, and by reason of this injury he was permanently lost the use of his left arm. Taking into consideration his age, health, and capacity to earn a livelihood, and the probabilities of life, and that he must henceforth go through life as a hopelessly maimed, and that by the loss of this arm he was necessarily debarred from his profession as a car repairer, it can be said that a verdict of \$7,500 is such as to show that the verdict is not excessive. In *Bolton v. Railway Co.*, 172 Mo. 92, 17 S. W. 2d 30, the plaintiff was a farmer, 35 years of age, and by the accident both bones of his lower limb were broken and the skin was lacerated. Fifteen months after the accident a large part of the limb was not united, but the surgeon was of the opinion that the limb would finally unite. It was held that the verdict of \$9,000 was not excessive as to authorize a setting aside of the verdict. In *Anderson v. Kansas City*, 177 Mo. 477, 76 S. W. 2d 100, the plaintiff, 19 years of age, was deprived of his right arm and suffered great physical and mental pain. It was held that a verdict of \$10,000 was not excessive. In that case a number of verdicts for similar injuries have been sustained by this court as not excessive were also in *Dougherty v. Railroad*, 97 Mo. 647, 8 S. W. 2d 251, in which a judgment for \$12,000 for the loss of the right arm was affirmed. We think there is nothing

Taylor v. Boston & M. R. R

amount of this verdict which would justify this court in interfering with it on the ground that it was excessive.

The judgment is affirmed.

Fox, J., concurs. BURGESS, P. J., not having heard the argument, takes no part in the decision.

TAYLOR v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, June 21, 1905.)

[74 N. E. Rep. 591.]

Injury to Brakeman—Contributory Negligence.*—In an action for injuries to a railroad brakeman while coupling cars, held, that the question of contributory negligence was one for the jury.

Same—Assumption of Risk.*—In an action for injuries to a railroad brakeman while coupling cars, held, that the question of assumption of risk was one for the jury.

Automatic Coupler Act—Application.†—A freight car which was being taken to a repair shop to be repaired was not within Rev. Laws, c. 111, §§ 203, 209, prohibiting a railroad company, in "moving traffic," from hauling a car not equipped with an automatic coupler.

Exceptions from Superior Court, Middlesex County; Wm. C. Wait, Judge.

Action by one Taylor against the Boston & Maine Railroad. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions sustained.

J. J. Shaughnessy, for plaintiff.

Richardson, Trull & Wier, for defendant.

MORTON, J. The plaintiff was tail-end brakeman on the night-shifting crew in the defendant's freightyard at Somerville, and was injured by having his right arm caught between two cars which came together while he was trying to cut off one of them from the rear of the train. The bumper, drawbar, and end sill were gone from the car, which allowed it and the next car to come together. This action was brought for the injuries thus received. At the close of the evidence the court, at the defendant's request, directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to this ruling.

We think that the ruling was wrong, and that the exceptions

*See foot-note appended to *Murphy v. Grand Trunk Ry. Co.* (N. H.), 14 R. R. R. 521, 37 Am. & Eng. R. Cas., N. S., 521.

†For the authorities in this series on the subject of the application of automatic coupler acts, see foot-note appended to *Mobile, etc., R. Co. v. Bromberg* (Ala.), 14 R. R. R. 823, 37 Am. & Eng. R. Cas., N. S., 823 (whether cars are used in carrying on interstate commerce); foot-note appended to *Philadelphia & R. Ry. Co. v. Winkler* (Del.), 10 R. R. R. 323, 33 Am. & Eng. R. Cas., N. S., 323 (whether tender a car).

Baltimore & O. R. Co. v. State

In view of this testimony, it could not be ruled, as matter of law, that the plaintiff assumed the risk or was guilty of contributory negligence.

The plaintiff further contends, in regard to assumption of the risk, that the case is governed by Rev. Laws, c. 111, §§ 203, 209, which provide that "in moving traffic" between places in this commonwealth a railroad corporation shall not haul or permit to be hauled or used on any of its lines a car which is not equipped with couplers coupling automatically by impact, and that an employee who is injured by any locomotive, car, or train used contrary to these provisions shall not be deemed to have assumed the risk of such injury. But we deem it enough to say that the uncontradicted testimony shows that the damaged car was not being used "in moving traffic," but was being taken to a repair shop to be repaired. The case does not therefore come within the statute.

The conductor testified, amongst other things, that the car was not to be cut off, and that he gave the plaintiff no orders to uncouple it. But there was testimony that the yardmaster in the plaintiff's hearing had ordered it to be placed on another track, and from this and other evidence the jury would have been warranted in finding that the plaintiff was acting in the usual course of his employment in attempting to uncouple the car.

Exceptions sustained.

BALTIMORE & O. R. Co v. STATE, to Use of LOGSDON et al.

(Court of Appeals of Maryland, June 20, 1905.)

[61 Atl. Rep. 189.]

Trial—Exceptions—Waiver.—An exception to a refusal to take the case from the jury at the conclusion of plaintiff's testimony is waived by the subsequent introduction of evidence.

Negligence—Proximate Cause—Proof.*—In an action for personal injuries, the plaintiff must not only prove that defendant was negligent, but that the negligence was the cause of the injury complained of.

Master and Servant—Personal Injuries—Evidence.—In an action against a railroad company for the death of a track walker who was struck by an engine running west on an east bound track, evidence held insufficient to justify submission to the jury of the question of defendant's negligence.

Appeal from Circuit Court, Allegany County; M. L. Keedy and Robert R. Henderson, Judges.

Action by the state, to the use of Henry T. Logsdon and an-

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that an employee is injured, see foot-notes appended to *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 14 R. R. R. 227, 37 Am. & Eng. R. Cas., N. S., 227; *Cully v. Northern Pac. Ry. Co.* (Wash.), 13 R. R. R. 165, 36 Am. & Eng. R. Cas., N. S., 165.

Baltimore & O. R. Co. v. State

other, against the Baltimore & Ohio Railroad Co a judgment for plaintiffs, defendant appeals. R

Argued before McSHERRY, C. J., and FOWLER, PAGE, and SCHMUCKER, JJ.

John G. Wilson and Ferdinand Williams, for a A. A. Doub and James A. McHenry, for app

BOYD, J. This is an appeal from a judgment pellant for the alleged negligence of its agents w the death of Henry T. Logsdon, Jr., the son of the tiffs. The Cumberland & Pennsylvania Railroa three tracks from Mt. Savage Junction to Cun run through what is called the "Narrows," a Mountain near Cumberland. The appellant h ment with that company by which it has the use for the purpose of running its trains to and fro which pass over the Pittsburg & Connellsville Ra der the control of the appellant, the latter road the Cumberland & Pennsylvania Railroad at Mt tion. The deceased was a track walker employ the Cumberland & Pennsylvania Railroad Con duties required him to walk over the tracks betwe Will's creek, which was east of Mt. Savage Jun of the Narrows, and what is known as the "Vi berland. He was required to inspect the tracks examine the rails, remove obstructions, signal th thing was wrong with the tracks or trains, see tha locked, and do other things necessary for the passing over the road. On the night of the acci curred shortly after 10 o'clock, he was engaged in about 9:50 o'clock stopped to eat his lunch at t operator at Eckhart Junction, which is at the w rows. He remained there until 10 o'clock, when carrying a lighted lantern, his tool sack, hammer water bucket. He was killed a short distance eas over Will's creek at a point about half a mile w Junction, and about that distance east of the j Pittsburg & Connellsville Railroad with the Pennsylvania Railroad. The night of the accide the appellant, known as No. 1,717, was hauling o trains from Connellsville to Cumberland, and w Ellerslie, a village about 2 or 2½ miles west Junction, the train parted near Ellerslie, and the e rest of the cars, went on towards Cumberland. ' Mt. Savage Junction tower noticed that the train the engine and cars attached passed his tower. H lamp the broken-train signal, but the engineer c He telephoned to the operator at Eckhart Juncti signal, which he did, and the train was stopped, went to what is called "Red Rock Switch Box,"

Baltimore & O. R. Co. v. State

east end of the Narrows. The trainmaster of the Cumberland & Pennsylvania Railroad, who had control of the running of trains between Cumberland and Mt. Savage Junction, instructed the operator at the latter place to order the engine to go back to Ellerslie after the rest of the train, on what is spoken of as the "middle track." He did so, and the engine crossed over from the third to the middle track, running backwards to Mt. Savage Junction, and the appellees contend that, while so running, that engine killed young Logsdon. The track furthest to the right in going west from Cumberland is the one used for west-bound trains, the middle track is used for east-bound passenger and fast freight trains, and the third is the one generally used for east-bound slow freight trains.

There are eleven bills of exception in the record. The first six present the rulings of the trial court in refusing to exclude evidence objected to by the defendant; the seventh embraces a prayer seeking to take the case from the jury at the conclusion of the plaintiff's testimony, which was refused; the eighth and ninth are the exceptions of the defendant to the refusal of the court to admit an agreement between the Cumberland & Pennsylvania Railroad Company in reference to the use of the tracks; the tenth was to allowing a witness to testify in rebuttal as to what the engineer said at Mt. Savage Junction about there being a light on the tender; and the eleventh includes the prayers. Four prayers were offered by the plaintiff, all of which were granted except the second, and the defendant offered ten, all of which were rejected excepting the fifth, which was granted as modified by the court.

As the defendant proceeded with its testimony after the rejecting of its prayers offered at the conclusion of the plaintiffs' evidence, it waived its exception presented by the seventh bill, and therefore cannot be considered by us; but it renewed that prayer at the end of the testimony, and it presents the important question to be determined by us, namely, whether there was legally sufficient evidence of negligence on the part of the defendant, which caused the death of young Logsdon, to be submitted to the jury. The appellees rely on what may be classified into three items of evidence, which they claim to have been sufficiently established to justify the ruling of the court in rejecting that (the eighth) prayer of the defendant—running the engine westward on an east-bound track on a dark night, not having any light on the west end of the tender or giving other sufficient signals, and the failure of the engineer to see Logsdon, or not to avoid the injury if he did see him. While we, for the purpose of giving these three items of evidence full consideration, will to some extent consider them separately, we will not overlook the fact that all of them are more or less connected together, and each must be considered in the relation it bears to the others.

If it be conceded that engine No. 1,717 did cause the death of this young man, it is clear that the mere running of the engine

Baltimore & O. R. Co. v. State

backwards in a westerly direction on an east-bound track, is not of itself sufficient evidence of negligence to justify recovery, certainly not under the testimony in this case. The contradicted evidence is that a train going west was on the west-bound track; indeed, the trainmaster testified that there were two trains standing on that track when he gave authority to run the engine west on the middle track. The engine could not go back on the third track by reason of the fact that it was connected with it being there, and, as the west-bound track was then in use by the trains entitled to it, the middle track was the one that would naturally and properly be used. The instructions were given to the operator at Mt. Savage Junction, and he was therefore to keep that track clear—block out any east-bound train until the engine cleared that track—and the testimony is conclusively that, in case of an emergency such as this, it was proper to use the east-bound track for this engine between Red Rock, where it was, and Mt. Savage Junction, where it was to leave the Cumberland & Pennsylvania Road, to go after the engine and the train left behind.

It must be conceded that although it is not negligence under such circumstances, a track for an engine going in the opposite direction from that for which the track is primarily intended, it is the duty of the agents in charge of such track to adopt all reasonable precautions to avoid injuring those who have the right to be, and may be, on the track. It is shown that Logsdon not only had the right, but it was his duty, to be on or about that track, and therefore no negligence can be ascribed to him merely because he was there, and the question is determined from the standpoint of one rightfully on the track. When an engine is run backwards under such circumstances as this record discloses—over the track of another road on a dark night in a gorge of a mountain, and where there were a walker and possibly other employees of one or both of the road companies are liable to be in the discharge of their duty there unquestionably ought to be a light at the end of the track, and, if any one who is rightfully on the track is shown to be killed or injured by reason of the failure to have such a light, some sufficient warning of the approach of the engine, the road company may be liable, unless exempt because the negligence was that of a fellow servant, or there was contributory negligence on the part of the person injured or killed. There may be some excuse recognized by the rules applicable to such cases. As the appellees contend there was legally sufficient evidence of the absence of a light, we will see what the record discloses to that.

H. A. Duvall, who was a brakeman on the train to which the engine had been attached, was called as a witness for the plaintiffs. After the train separated, he went from the engine behind to Mt. Savage Junction, and was there when the engine came back from Red Rock. He was asked whether

Baltimore & O. R. Co. v. State

any lights or signals on the engine. The defendant's counsel objected to the question, and one of the plaintiff's counsel stated that "the offer was made in connection with the offer to show that at the upper end of the Narrows, about 300 yards below the point of the accident, there was no light burning on the tender, and beyond the point of the accident at Mt. Savage Junction there was no light burning." The court then permitted the question to be asked, and he replied, "No, sir; none that I could see." He also said, "Whenever we are running backwards we generally have the lights on the rear end," and, in answer to the question whether that was the rule, he said, "Yes, sir; they are supposed to have a light." He also said that the lanterns were in the engine; that he saw two, red and white, which was the usual number. On cross-examination he stated that the place of accident was, in his judgment, half a mile from Mt. Savage Junction; that he did not know whether there was any light there when the accident happened, or whether there was any on the tender. He was called in rebuttal, and, on being asked what he said to the engineer about the light, he replied: "I asked him, did he leave a light out, and he says 'yes,' and I says, 'where is it now?' and the light was setting in the engine, and I don't just remember what he said to me about the light, but he says that he had taken the light off the end of the tank to see the man; that he didn't have any torch." On cross-examination he was asked, "He told you that at the time of the accident, at the place of the accident, he had a light on the tender?" to which he replied, "Yes, sir."

Adam Brown, who was the operator at Eckhart Junction, was also called by the plaintiff, and his evidence on that subject was as follows: "Q. Was there any light on the tender going west? A. That I cannot say. Q. Did you see any light? A. I was engaged in taking the number, and, if he had a light on, I didn't see it. I was engaged in taking the number of the two engines; one was going west on the middle track, and one going west on the west-bound track. Q. You are trying to give a reason why you did not see it; did you see any light? A. I cannot say. Q. Can you say whether you saw it or not? A. No, I cannot say whether I saw it. Q. Why can't you? A. I was engaged in taking those numbers. Q. Did you say you did not see any number? A. I was looking at the number on the headlight." He also said that it was his duty to take the numbers of the engines.

That is all the testimony offered by the plaintiffs on this subject, excepting on the cross-examination of Mr. Jones, who was the switchman at Red Rock. He was asked: "Q. Do you know anything about the lights on the tender when they started out?" To which he replied, "Now, sir, I am not positive; I am not positive about the lights being on the tender, but I saw with my own eyes the fireman with one white lamp in between the fire box and the tender." And on being asked, "What was he doing

Baltimore & O. R. Co. v. State

off to see the man. It might possibly be that, when the engine-man saw this unfortunate young man's body lying there in the condition described by him and the other witnesses, he would neglect to see that it was replaced on the tender before starting. There is no denial of the fact that he did take the lantern from some part of the engine. If the uncontradicted evidence did not show that there had been this use of the lantern at the place of the accident, and especially if the engine had been run without any stop from the time it left Red Rock until it got to Mt. Savage Junction, an inference might be drawn from the fact that it was not on the tender, but was on the engine, when it reached the latter place; that it was not on the tender when the accident happened. But inasmuch as there was this intermediate use of the lantern, it would be going very far to hold that the evidence of Duvall was legally sufficient to overcome the positive testimony of the engineman and fireman that the lantern was on the tender at the place of the accident. In *State, Use Miller, v. B. & O. R. Co.*, 58 Md. 221, the court said that the evidence of three witnesses that they saw no brakeman on the cars after they had stopped and the accident had happened was not inconsistent with that of the engineer, who testified positively that a brakeman was on the cars while they were in motion.

But in addition to that, there is not a particle of evidence that the absence of the light was in any way connected with the accident. Mr. Logsdon left Eckhart Junction about 10 o'clock, going west on the middle track. He was in the office of the operator at that point when the signal came that the engine would go on that track, and the operator so told him, although he apparently was under the impression that it could not cross over to that track until he came back. Mr. Brown said, "He told me, if this engine was going to cross, that they would have to wait until he came back." Why he had such impression the record does not show, but about 10 minutes after he had started the engine passed Eckhart Junction, going west on the middle track. There is no contradiction of the engineer and fireman as to the blowing of the whistle and the ringing of the bell. The west-bound freight train was passing the place of the accident at the time this engine did. McMillan testified that the engine of that train was about four lengths of an engine ahead of him at that place. There is nothing to show what young Logsdon was doing at the time. The noise of the west-bound train may have prevented him from hearing this engine, or that may have attracted his attention in such a way as to cause him to observe this engine. There may be many conjectures as to what caused the accident, but it was utterly impossible for the jury to have known from the evidence in the record that it was caused by the absence of the light, even if it be conceded that there was none on the tender. A verdict, therefore, based on that, would be founded on a mere possibility—a conjecture or guess. It is well settled in this state that, in order to recover, the plaintiff must not only prove negli-

Baltimore & O. R. Co. v. State

lookout, as the circumstances required, they or one of them would have seen him or his lantern. But here, again, we are required to indulge in mere conjecture in order to sustain the appellees' position, and that, too, in the face of the positive evidence introduced by the appellant. There is no evidence that Logsdon's lantern was lighted at the time of the accident. It is possible that for some reason it was not; but if we assume that it was, we can readily understand how it might not have been seen, if the engineer was, as he testified, looking in the direction he was going. If Mr. Logsdon had placed his lantern on the roadbed or a cross-tie while making an examination or some repairs in the line of his duty, and was east of the lantern, he might have been between it and the approaching engine. The lights from the train going west might, under those circumstances, have prevented the engineman from noticing the light from the lantern, which would be reflected to either side of Mr. Logsdon, if there was any. The plat filed shows there is a slight curve to the right for some distance east of the place where the accident occurred. The engineman was on the left side, going backwards. His view would thereby be somewhat cut off from a point west of him, and the tender would necessarily obstruct it to some extent, especially if the lantern was on the ground, or even hanging in Logsdon's hand. The fireman said he was standing down by the fire box. His duties necessarily require him to be there much of the time, especially if his statement was true that he was having trouble with his fire and "the steam was going back right along." There was no evidence whatever that the engineman did see Mr. Logsdon before the accident, and, as it is not shown where he was, there can be no such question as sometimes arises in cases of this character, as to whether the accident could have been avoided after discovering the injured party on the track. There is nothing to meet the positive statement of the engineman that he did not see Mr. Logsdon, although looking in that direction, excepting the bare fact that about 25 minutes before the accident he started up the track with a lighted lantern, and there is a total absence of testimony as to what he was doing or how the accident occurred. Manifestly, that is not sufficient under the authorities applicable to such questions.

We find nothing in the record that could possibly support the charge of negligence beyond what we have considered. The death of a young man in full health, especially one of such a character as the record shows Mr. Logsdon to have been, is greatly to be deplored, and the loss to parents of such a son cannot well be estimated by others; but the law does not authorize a recovery under such circumstances as this record discloses. It will therefore not be necessary to pass on other questions in the case, but assuming the evidence admitted by the court below to be admissible, and giving it and the other testimony all consideration that the law permits or requires, we are forced to the conclusion that we must reverse the judgment on account of

Southern Pac. Co. v. Gloyd

guarded against was a personal danger to the master himself, is erroneous, as stating an incorrect measure of care, as well as misleading, in that there could be no evidence to make it applicable to a railroad company.

In Error to the Circuit Court of the United States for the District of Utah.

The defendant in error (plaintiff below), after three years' service as locomotive fireman on a Wisconsin railroad, entered defendant's service as freight brakeman March 5, 1902, upon the division of defendant's railroad between Carlin and Wadsworth, a distance of 256 miles. He made one trip over that division in March; four or five in April; and from July 1st, worked steadily, except one day, until July 21st, when he was injured. Up to his last trip he had been head brakeman, but on that trip he was rear brakeman. On this division was Rokeby Hill, ascending eastward from Cressid to Rokeby, a distance of two miles, on a grade so steep that more than three-fourths of the east-bound freight trains had to be "doubled" on that hill. The engine would haul the whole train up the hill until it could go no farther, when the train would stop, and be separated near the middle, and the rear section left with brakes set, to hold it while the engine went on with the forward section to a siding at the top of the hill, whence it would return and take up the rear section, when the train would be united, and go on. Some freight trains went over the hill without "doubling," and all others, before being separated, were taken as far up the hill as the engine could haul the whole train; and thus the stopping of the train and the necessity of dividing it might occur at any place from near the bottom to near the top of this long hill. At Cressid there was a switch siding, and at a short distance east of that was a culvert, crossing the roadbed under the tracks for the passage of water. This culvert was covered with plank at least for a space of four feet outside of each rail. At long distances from this culvert and from each other two other culverts, to allow the passage of water, crossed the grade of the railroad at different places on the slope of this hill. These two culverts were each eight feet or more in width, of varying depth, and without covering, except the stringers, ties, and rails. On that division of said railroad over which the plaintiff was constantly passing were 168 similar open culverts. On July 21, 1902, the freight train on which plaintiff was rear brakeman left Wadsworth, going east, with 20 loaded and 2 empty cars. On reaching Rokeby Hill after midnight, plaintiff, by direction of the conductor, went ahead over the cars to about 10 cars from the engine, to be ready to "double"; and, when the train stopped, plaintiff passed to the ground with a lantern, turned the air cock, uncoupled the hose, and released some air to set the air brakes in the rear section, and signaled the engineer for slack, which being responded to, he pulled the coupling pin, and signaled the engineer to go forward. But the backward movement had started the rear section,

Southern Pac. Co. v. Gloyd

uncovered, as less exposed to danger from fire which might cause wreckage of trains, and also from danger of weakening from decay caused by moisture held between planks and timbers. On the division upon which plaintiff had worked as brakeman during the time stated, there were, and had been since the year 1868, 168 such open culverts, including those on Rokeby Hill, and, though the practice of "doubling" freight trains had been the same during all this time, no such accident had ever before happened, while many fires upon the covered culverts had occurred. It was the duty of the railroad company to use care to guard against all probable dangers to its trains laden with passengers and freight, and surely against so serious a danger as the weakening or destruction by fire of culverts on its main line, away from yards or stations where such fire would be observed. It had, in view of the dangers to be apprehended, and of the universal usage of railroads in that region, to use its discretion as to whether it was safer, all things considered, to maintain this particular culvert covered or uncovered, under the rule, which has been applied to unblocked frogs (*Gilbert v. Burlington*, etc., R. Co., 128 Fed. 533, 63 C. C. A. 27), double deadwoods (*Northern Pacific R. Co. v. Blake*, 63 Fed. 45, 11 C. C. A. 93), sharp curves (*Tuttle v. Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150). And as fires had started in the covering of culverts on that division, that was a danger of which the defendant company was warned and should guard against, while, as no harm to an employee had happened during all that time from the many uncovered culverts on the same division, such danger would be less likely to be anticipated.

The company would hardly expect that a brakeman would have passed as many times as plaintiff did over that division of its railroad, with its 168 open culverts, without, as plaintiff testified, having observed any of them, or anticipate that descending from a car, with a lighted lantern, 10 feet from such large, open culvert, which must have been plainly visible at the side of the track, he would there, just above the culvert, go between two cars and separate them, failing to release sufficient air to set the brakes of the rear cars, and follow those cars, with the lantern in his hands, into the open culvert, in his tardy attempt to release more air. The pretense that, in releasing air to set the brakes in the first instance, there was need of caution not to release too much, and set the brakes too hard, lest a jerk should endanger the drawheads, is palpable. The train had stopped still for lack of power, when being drawn up an ascent. Between each car the "slack was out" when the train stopped, and no excess of brakes could have caused any jerk.

The evidence made it clear that open culverts between stations and away from switches were in common use upon all railroads in that part of the country. The use of this open culvert was therefore not negligent on the part of the defendant, and any

Clemans v. Chicago, etc., Ry. Co

cise of ordinary care, usually taken by prudent and intelligent principal officers and managers of a railroad in respect to the construction of culverts on their main line, where such officers and managers were also the brakemen on the trains, and personally subjected to whatever perils to brakemen might arise from the culverts along the line. Such an instruction, applicable to no evidence in the case, could only leave the jury to conjecture what care or precaution would be taken under such fanciful conditions, if by the exercise of their imaginations they could bring themselves to contemplate as real such visionary unreality. The object of stating a rule of law to a jury is to afford them a safe, practical guide, which can be comprehended, and which is applicable to the evidence they are to consider, and which, if observed, will lead them to right conclusions from that evidence. To give the jury a rule that is not applicable to any evidence in the case, or that can be produced, can only mislead them, and is manifest error. The exact question, arising upon a similar instruction, has just been considered in this court in *Southern Pacific v. Hetzer* (C. C. A.) 135 Fed. 272, wherein Judge Sanborn reviews the authorities, and so clearly demonstrates the error in the instruction that further comment is needless here.

Judgment is reversed, and the cause remanded, with directions to grant a new trial.

Hook, Circuit Judge, concurred in the reversal, but not in all of the grounds as stated.

CLEMANS v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, July 12, 1905.)

[104 N. W. Rep. 431.]

Railroads—Injuries to Trespassers—Discovered Peril—Care Required—Question for Jury.*—Where a brakeman who was on the rear of a train backing toward plaintiff, who was going in the opposite direction, testified that when the train was 250 feet from plaintiff he noticed that she was not going to leave the track; that he then called to her, and, failing to receive recognition, immediately signaled the engineer; and it appeared that the train was stopped as soon as possible after the signal was given, but there was other evidence that it was not given until the train was within 10 feet of plaintiff, or just as it struck her—whether defendant exercised ordinary care to prevent the accident after discovering plaintiff's peril was for the jury.

*As to the care due trespassers on railroad tracks, see foot-note appended to *Central of Georgia Ry. Co. v. Williams Buggy Co. (Ga.)*, 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S. 171; *Gregory v. Wabash R. Co. (Iowa)*, 15 R. R. R. 457, 38 Am. & Eng. R. Cas., N. S. 457; *Manning v. Illinois Cent. R. Co. (Ky.)*, 15 R. R. R. 178, 38 Am. & Eng. R. Cas., N. S. 178; *Kendrick v. Seaboard Air Line Ry. (Ga.)*, 15 R. R. R. 175, 38 Am. & Eng. R. Cas., N. S. 175; foot-notes

Clemans v. Chicago, etc., Ry. Co

and her mother were trespassers, and the defendant owed them no duty until their peril was known. *Burg v. Railway Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419; *Masser v. Railway Co.*, 68 Iowa, 602, 27 N. W. 776; *Thomas v. Railway Co.*, 93 Iowa, 248, 61 N. W. 967. But when it first became apparent that they did not know of the approach of the train, and that there was danger of striking them, the active duty of the defendant arose, and it was then bound to exercise the care required by the law in case of nontrespassers. *Goodrich v. B. C. R. & N. Ry. Co.*, 103 Iowa, 412, 72 N. W. 653; *Sutzin v. Ry. Co.*, 95 Iowa, 304, 63 N. W. 709; *Orr v. Ry. Co.*, 94 Iowa, 423, 62 N. W. 851. No one disputes the testimony of the brakeman that he called to the plaintiff when she was first discovered to be in peril; but it surely cannot be said, as a matter of law, that such a warning constituted the care and diligence necessary to relieve the defendant from liability. Whether the defendant was guilty of negligence after the plaintiff's peril was discovered was therefore a question for the jury. An ordinance of the city of Des Moines prohibited the running of trains within the corporate limits at a rate of speed greater than six miles per hour, but the court held it to be immaterial in this case, and we think the ruling clearly correct. The ordinance undoubtedly was for the protection of the public in so far as it had the right to cross or use the defendant's tracks, and no further. Except at crossings or at other places where the public have a right of way, the person who crosses the track or travels thereon does so at his peril. He is there as a trespasser, and has no right to interfere with the clear track which the public demands, and which the law insists upon. A railroad is, to a certain extent, a public highway, and subject to public control; and the company operating it has the right, inhering in its ownership, and for the benefit of the public, to a clear and unobstructed way, and it may lawfully assume that this right will be respected by all persons. The plaintiff was a trespasser, and, as we have seen, the defendant company owed her no duty until her danger was known. As said by Mr. Justin Harlan, in a concurring opinion in *Felton v. Aubrey*, 74 Fed. 350, 20 C. C. A. 436: "The city ordinance did not and could not make his presence on the track rightful at a place other than one where the rights of the railway and the public were mutual, or where the circumstances were such as to imply a license to use the track by wayfarers. If he was a trespasser, the railway company owed him no duty except that of avoiding his injury if his danger was discovered in time to do so." In *Masser v. The Chicago, R. I. & P. Ry. Co.*, 68 Iowa, 602, 27 N. W. 776, there was a practical application of this rule, although it was not discussed along the line adopted here. See, also, 2 Thompson on Negligence, § 1708; *Prewitt v. Eddy*, 115 Mo. 283, 21 S. W. 742. The cases cited by the appellant in support of a contrary rule are not in point. They are Grand Trunk

Kansas City Southern Ry. Co. v. Murphy

only question in the case which calls for hesitation in affirming the judgment is the argument of appellee's counsel.

In stating the case preliminary to the testimony, the counsel said: "I don't know positively what the defense which will be offered in this case will be, but presume that it will be the same old, stereotyped defense, that the mule ran upon the track, and they did not have time to avoid the killing of the mule after they saw it. The law is— Mr. McDonough: I object to that statement, your honor. The Court: The court is very liberal about the opening statements. It can be contradicted by those who follow. Mr. McDonough: I except." The appellant, it is seen, in proper manner, raised the question, first by directing an objection to the argument, thereby calling for and obtaining a ruling by the court, and then excepting to such ruling. This exception is properly brought forward in the motion for new trial.

Further objection was made to the closing argument, in which counsel related an incident illustrative of the feminine characteristic to say, "I told you so." It is not clear whether its application was intended to the "stereotyped defense," or some other forecast of the testimony. It was but a bit of pleasantry, which counsel desisted from pursuing promptly upon objection being raised, and no ruling of the court was asked upon it, and no exception taken.

Another objection to the concluding argument was made. Counsel for appellee was arguing the law applicable to the facts from his standpoint, when opposing counsel objected to his statement of the law, and said he desired to save an exception. The court replied, "The instructions say what the law is." No exception was taken to this ruling, and, even if the argument had been improper, the court's declaration to the jury to look to the instructions for the law was acquiesced in by appellant, as no exception was taken to this disposition of the objection.

The question recurs as to the argument in the opening statement, in which counsel anticipated the defense would be "the same old, stereotyped" one. The office of the opening statement is: "First, the plaintiff must briefly state his claim, and the evidence by which he expects to sustain it; second, the defendant must then briefly state his defense and the evidence he expects to offer in support of it." Kirby's Dig. § 6196. It is the duty of trial judges to see that counsel, in his opening statement, confines himself to a brief statement of his claim or defense, and the evidence he expects to offer to sustain it. *McFalls v. State*, 66 Ark. 16, 48 S. W. 492; *Marshall v. State*, 71 Ark. 415, 75 S. W. 584. There have been many cases in this court involving alleged improper remarks of counsel, and many have been reversed therefor, and others have been affirmed notwithstanding improper remarks, and in others the remarks in question have been sustained as properly within the privilege of counsel. The subject, in its ever-varying form, may be found considered in

Rapp v. St. Louis Transit Co

able efforts of the trial judge to eradicate the evil effects of them will be unavailing. In such event, then, a new trial is the only way to remove the prejudice, notwithstanding the judge may have reprimanded or even fined the offending attorney, and positively and emphatically instructed the jury to disregard the prejudicial statements. In the final analysis, the reversal rests upon an undue advantage having been secured by argument, which has worked a prejudice to the losing party, not warranted by the law and facts of the case. In the one class of cases the reversal rests upon the abuse of the discretion of the trial judge in not confining the argument within its legitimate channel, and not properly instructing upon it, or sufficiently reprimanding or punishing the offending attorney; and in the other, or exceptional class, it rests upon the extremely harmful nature of the remarks, which cannot be cured other than in a new trial upon the merits of the case, freed of extraneous prejudice. In the case at bar the argument was improper, but not one calculated to carry great weight. The anticipation of a "stereotyped defense" was not a statement of the plaintiff's claim, nor the evidence to support it, and the court should have been more emphatic in dealing with it. The court did not sustain the objection or approve the argument, but rather indicated it was improper, by saying that he was liberal with opening statements, because they could be contradicted by those who follow. While this is not a fulfillment of the rule frequently announced by this court, yet it cannot be said it was in this case an abuse of discretion to so treat these remarks; and an examination of the evidence indicates that the verdict was responsive to it, and not to these extraneous remarks.

The judgment is affirmed.

RAPP v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, June 28, 1905.)

[88 S. W. Rep. 865.]

Street Railroads—Negligence—Question for Jury.—In an action against a street railroad company for injuries to plaintiff in a collision between his vehicle and a car, held, that the question of defendant's negligence was one for the jury.

Same—Contributory Negligence.—In an action against a street railroad company for injuries to plaintiff in a collision between his vehicle and a car, held, that the question of plaintiff's contributory negligence was one for the jury.

Municipal Corporations—Ordinance—Regulations of Street Railroad—Action for Injuries—Pleading.—In an action for injuries to plaintiff in a collision between his vehicle and a street car, the petition alleged negligent operation of the car, and also alleged negligence of defendant's motorman in failing to keep such "vigilant watch" for vehicles and persons as was required by a certain ordinance. Held, that it was proper to refuse to require plaintiff to elect

Rapp v. St. Louis Transit Co

whether he would stand on the allegations as to general negligence or on the allegations as to the ordinance.

Same—Uniting Actions Ex Contractu and Ex Delicto.—The action was not open to the objection that it combined in one cause of action ex contractu and one ex delicto.

Street Railroads—Negligence—Injuries—Action—Instructions.—In an action against a street railroad company for injuries to plaintiff in a collision between his vehicle and a car, plaintiff's counsel intended to show that, while his horses were on defendant's track, defendant's servants negligently caused the collision; and that plaintiff was that plaintiff negligently assumed such position when a collision could not have been avoided by ordinary care. The court instructed for plaintiff that though plaintiff, while trying to get his vehicle out of a hole in the street, got it on the track, yet if defendant's motorman saw the danger, and could, by the exercise of ordinary care, have prevented the collision, but failed to do so, plaintiff was entitled to recover, even if he did not exercise ordinary care in placing his horses on the track. An instruction for defendant was that if the motorman saw the horses near the track, but so far away that they could be in danger, the motorman had the right to assume that they would remain there, but that if thereafter plaintiff's horses changed their position, and got in front of the car, and thereby directly caused the injuries, and the motorman could not have stopped the car, and avoided the accident, plaintiff could not recover. Held, the instructions, taken together, properly presented the issues.

Same—Negligence—Discovered Peril.*—Though one may be guilty of contributory negligence in being on a street car, a street car company is liable for any injury it could have prevented by the exercise of ordinary care after the discovery of the danger.

Negligence—Injuries—Damages.—In an action for injuries to plaintiff resulting from the alleged negligence of defendant, it appeared that plaintiff was rendered unconscious, and his body bruised; that one of his arms was so crushed that it was necessary to amputate one of his arms; that he was so crushed that it was necessary to amputate one of his legs; that he would always be crippled more or less; that he suffered great pain, was confined to his bed for five months, and obliged to use crutches for about six weeks, and that the surgeon's bill was between four and five hundred dollars. Held, a verdict for \$6,000 was not excessive.

In Banc. Appeal from Circuit Court, St. Charles County, Mo. M. Hughes, Judge.

Action by George Rapp against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehmann and *Geo. W. Easley*, for appellant.
A. R. Taylor, for respondent.

BRACE, C. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the sum of \$6,000 in damages for personal injuries. The cause of action stated in the

*For the authorities in this series on the subject of the effect of contributory negligence and negligence after the discovery of plaintiff's peril, see *Omaha St. Ry. Co. v. Larson* (Neb.), 13 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643, foot-notes appended to *Carter v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas., N. S., 324; foot note appended to *Memphis St. Ry. Co. v. Haynes* (Tenn.), 13 R. R. R. 384, 36 Am. & Eng. R. Cas., N. S., 384; *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 34 Am. & Eng. R. Cas., N. S., 91.

Rapp v. St. Louis Transit Co

is as follows: "That on the 1st day of February, 1901, the plaintiff was lawfully driving a team of horses attached to a loaded wagon northward on Broadway at its intersection with Buchanan street, when the wheels of the wagon he was so driving went into a hole in said streets at their intersection, and said team were unable to pull the wagon further, and became stalled, and, in endeavoring to get said wagon pulled out of said hole, said team were upon the track of the defendant, St. Louis Transit Company, and whilst said team were so on the track of said St. Louis Transit Company on said streets at said place, and whilst said wagon and the wheels thereof were at and near said defendant's track, the defendant St. Louis Transit Company's motorman and conductor in charge of its south-bound car carelessly and negligently, and without using ordinary care to control or stop said car, caused and suffered said car to collide with said team and a part of said wagon, whereby plaintiff was thrown from said wagon to the street, and one of the horses of said team was thrown and fell upon the plaintiff, greatly and permanently injuring plaintiff upon his body, legs, and feet, causing a concussion of the brain, which rendered him unconscious. His foot was thereby crushed, bruised, and injured, and the bones thereof, and the ligaments, tendons, muscles, and flesh thereof, were fractured, ruptured, displaced, and torn, and plaintiff was permanently injured thereby. And for another and further assignment of negligence of defendant, St. Louis Transit Company, the plaintiff avers that at the time of his said injuries there was in force in the city of St. Louis an ordinance of said city, whereby it was provided that motormen and conductors of street cars should keep a vigilant watch for vehicles and persons either on its track or moving towards it, and, upon the first appearance of danger to such vehicle or person, the car should be stopped within the shortest time and space possible; and plaintiff avers that, at the time of said collision and his injuries, defendant's motorman and conductor in charge of its said car failed to keep such vigilant watch, and failed to stop said car within the shortest time and space possible upon the first appearance of danger to said vehicle and plaintiff, which violation of said ordinance directly contributed to cause said collision and plaintiff's said injuries." The answer was a general denial and the following plea: "For another and further defense to said petition, defendant avers that whatever injuries the plaintiff sustained were occasioned by his own carelessness and negligence in driving in front of defendant's moving car while the same was in close proximity to him." The facts in the case disclosed by the evidence are substantially as follows: The plaintiff, a young man aged about 24 years, in the employ of one Merten as driver of a coal wagon at \$10.50 per week, was on the 1st day of February, 1901, driving a two-horse team and wagon loaded with coal on Broadway, in the city of St. Louis, on which street the defendant operates its street cars upon two tracks; north-bound cars going

Rapp v. St. Louis Transit Co

on the east track, and south-bound cars on the west track. The plaintiff was driving north on the west side of Broadway with and distant from the west track about three feet near the intersection of Broadway with Buchanan street. The front wheels of his wagon went into a hole in the street and the team stalled. He succeeded in getting the front wheels out when the hind wheels went into the hole, in order to get them out he had to swing his horses towards the east across the west track, which brought the fore wheels against or very near the west rail of that track; and when he had done so, and the team and wagon were in this position, the plaintiff, standing between the doubletrees, urging his horses to the pull, the team was struck by one of defendant's south-bound cars, the wagon turned over and the plaintiff thrown under one of the horses, rendered unconscious, one of his feet mashed, and his body otherwise injured. From the injury to his foot he suffered great pain, was confined to his bed for five months, afterwards used crutches for six weeks, and then a cane for about two weeks, and has not been able to walk without either; but, when the foot touches anything hard, it hurts. He was under surgical treatment for several months. The surgeon who attended him testified that the foot had been crushed and laid open; that there was a cut extending from the tip of the large toe to the upper part of the foot; that blood poisoning set in, the tissues sloughed off, and amputation of the big toe became necessary; that in cutting off the foot it became necessary to clip one of the phalanges or end bone, which protruded, and that he will always be crippled more or less. The charges for his services are between four and five dollars; and that they are reasonable. It was daylight when the accident happened. The track was level. The view for three or four blocks was unobstructed. The evidence of the plaintiff tended to prove that the defendant's car was going at the rate of 20 miles an hour; that no effort was made to stop the car or check its speed before the team was struck, and that it went 30 or 40 feet after the team was struck before it stopped; that the team was on the track some time before it was struck—plaintiff says, four or five minutes. Three other witnesses testify that the plaintiff's team was on the track when they saw the defendant's car approaching at a distance of 250 to 300 feet, that no effort was made to stop the car, and that its speed was not checked until after the collision. The evidence further tended to prove that the car, going at the rate of 20 miles an hour, could have been stopped with the brake in about 130 feet, and with the reverse in about 100 feet; that when going at the rate of 15 miles an hour could have been stopped with the brake in 90 or 100 feet, and with the reverse in about 75 feet. The only witness called for the defendant was the motorman, who testified that he first saw the plaintiff's team when he was one block north of where the team was struck, that the horses were not then on the track, but standing

Rapp v. St. Louis Transit Co

side it; that his car was going about 10 miles an hour; and that when the car was about 50 or 60 feet from the horses they swung across the west rail, were struck, and the car ran about 30 feet further.

1. At the inception of the trial the defendant moved the court to require the plaintiff to elect on which one of the causes of action stated in the petition he will stand, upon the grounds: "First, that said petition attempts to combine in one count both alleged common-law negligence and the alleged violation of an ordinance commonly called the 'Vigilant Watch Ordinance'; second, said petition attempts to combine in one count a cause of action *ex contractu* and a cause of action *ex delicto*." And in the course of the trial the plaintiff was permitted to introduce said ordinance in evidence over the objections of the defendant. The overruling of the motion to elect and the admission of the ordinance in evidence are assigned as error. These assignments of error were argued and considered in the case of *Sluder v. Transit Company*, 88 S. W. 648, in which the whole question is exhaustively treated in the opinions in that case, delivered at the last sitting of the court in banc, on the 1st of June, 1905, and in which the ruling was adverse to the contention of the defendant. Hence we hold in this as we did in that case, which is on all fours with this on these points, and for the reasons stated in the majority opinion therein, that the court committed no error in overruling the motion to elect, nor in admitting the ordinance in evidence.

2. At the close of plaintiff's evidence and at the close of all the evidence the defendants interposed a demurrer thereto, and the overruling of these demurrers is assigned as error.

On the main issue the case was submitted to the jury upon the following instructions:

For plaintiff:

"(1) Although the jury should believe and find from the evidence that the plaintiff, whilst trying to get his wagon out of a hole in the street (if the jury find that the wagon was so in a hole) and that, in driving his horses attached to the wagon, got them upon defendant's track in Broadway, yet if the jury find from the evidence that after said horses were so upon said track they were in danger of being struck by defendant's south-bound car, and that defendant's motorman saw said team on said track, and in danger of being struck by said car, and that, after said motorman saw said team on said track and in such danger, he could, by the exercise of ordinary care, have stopped said car and prevented said car from striking said team, and neglected to do so, and caused said car to strike said team and injure the plaintiff, then plaintiff is entitled to recover, even if the jury should believe that he did not exercise ordinary care in pulling his horses on said track.

"(2) If the jury find from the evidence in this case that on the 1st day of February, 1901, the defendant was operating the

Rapp v. St. Louis Transit Co

than for the team to have stopped, then it became the duty of the plaintiff not to attempt to cross in close proximity to the approaching car, but to stop temporarily and let the car pass; and if you find from the evidence that by so doing the plaintiff could have avoided the collision, and that he failed so to do, then you should find that the plaintiff was guilty of negligence, which defeats the plaintiff's right to recovery in this action, and your verdict must be for the defendant, *provided you further find the defendant, by the exercise of ordinary care and prudence, could not have avoided the collision after it discovered the perilous position of the plaintiff.*

"(4) The court instructs the jury that if they believe from the evidence that plaintiff saw said car coming, or in the exercise of ordinary care could have seen said car coming, and that he was then standing on the doubletree of his wagon, and that he could have avoided said accident by jumping from said wagon, and that in the exercise of ordinary care he would have jumped, and that he failed to do so, and thereby directly contributed to his injuries, he cannot recover, and your verdict must be for the defendant, *provided you further find that the defendant, in the exercise of ordinary care and prudence, could not have avoided the collision.*

"(5) The court instructs the jury that if from the evidence the jury believe that defendant's motorman operating the said car saw plaintiff's wagon and horses resting near defendant's track, but so far away from said track as not to be in danger of being struck by said moving car, defendant's motorman had the right to assume that plaintiff's horses would remain in said position, and had the right to move his car forward; and if the jury further believe from the evidence that thereafter plaintiff's horses changed their position, and got in front of said car, and thereby caused or directly contributed to plaintiff's alleged injuries, and that the motorman in charge thereof could not then stop his car and avoid said accident, plaintiff cannot recover, and your verdict must be for the defendant."

Instructions Nos. 2, 3, and 4, as asked for by the defendant, were modified by the court by adding the proviso in each in italics. The modification of these instructions and the giving of the two instructions aforesaid for the plaintiff are assigned as error.

3. It is contended for the defendant that the demurrer to the evidence ought to have been sustained because that plaintiff turned his horses directly across the track, without looking or listening for an approaching car, and continued in that position, when there was nothing to prevent his swinging his horses to their original position, where they would have been out of danger from the approaching car, which he might have seen if he had looked. This contention is not well grounded. Plaintiff testified that when he swung the horses across the track he looked, and there was no coming car in view; that he did not look again be-

Rapp v. St. Louis Transit Co

time. The evidence for the plaintiff tended to prove the cause of action set up in the petition; and that of the defendant, the defense set up in the answer; and there never was a clearer case for a jury; and the court committed no error in overruling the demurrers to the evidence.

4. The instructions given for the plaintiff, the modification of the defendant's instructions as asked, and the refusal of the court to give three other instructions asked by the defendant are attacked upon the ground that the effect thereof was to eliminate from the consideration of the jury and contributory negligence of the defendant; and the argument in support thereof is on the same line with that made in support of the demurrer to the evidence. The issues to be submitted to the jury under the pleadings and on the evidence in this case were plain and simple. The charge in the petition is that while the plaintiff's horses were on the defendant's track, and his wagon at or near it, the defendant's servants carelessly and negligently caused the defendant's car to collide therewith, without using ordinary care to prevent the collision. Plaintiff's evidence tended to prove the cause of action stated in the petition. The defense was that the plaintiff negligently assumed this position with his wagon and team when defendant's car was in such close proximity thereto as that the collision could not have been avoided by the exercise of ordinary care, and the evidence for the defendant tended to prove this defense. These issues were submitted to the jury by instruction No. 1 for the plaintiff and instruction No. 5 for the defendant, and, when read together, these instructions presented the main issues of the whole case so fairly and squarely to the jury as to point the way to a correct verdict upon the weight of the evidence. While the other instructions given were not inconsistent with these two, the case would have been better and more clearly presented, had the additional instructions been omitted, which, while they did not change, may have to some extent obscured, the meaning of the instructions as a whole; but, when these instructions are read as a whole, it will be seen that the only negligence of the plaintiff pleaded in the answer, of which there was proof, and which could avail as a defense to his action, was duly presented to the jury as sufficient ground to defeat a recovery and authorize a verdict for the defendant, and that no negligence of the plaintiff of which there was any proof, and which could have been of any service as a defense to the plaintiff's action, was withdrawn from the consideration of the jury, unless we are prepared to hold that a traveler upon the street must at all times, when he happens to be on a railroad track therein, keep a continuous watch for an approaching car, at the peril of his life or limb, and that a failure to do so will exempt the railroad company from any liability for failure to use ordinary care to prevent injury to him, and, as a necessary corollary, that such traveler has no right to assume that the servants of a street railway company will not, so far as they can by the exercise of ordinary care, refrain

Southern Ry. Co. v. Williams

5. No error is assigned upon the instructions on the measure of damages, but it is contended that the verdict is so excessive as to evince passion and prejudice on the part of the jury. We do not think so, in view of the plaintiff's serious injuries, which have been fully set out. While the verdict is a liberal one, it does not shock our sense of justice, or furnish any reasonable ground for the assumption that it was the product of partiality or prejudice on the part of the jury.

On the whole record, finding no substantial error in the trial, affecting the merits of the case, the judgment of the circuit court will be affirmed. All concur, except that Marshall, J., does not concur in the rulings in the Sluder Case, referred to in the opinion.

SOUTHERN RY. CO. v. WILLIAMS.

(Supreme Court of Alabama, Feb. 9, 1905.)

[38 So. Rep. 1013.]

Railroads—Failure to Stop at Crossing—Statutory Duty—Injury to Pedestrian—Negligence.*—Under Code 1896, § 3441, requiring trains to stop at railroad crossings, and section 3443, making railroads liable for all damage resulting from failure to comply with any of the three preceding sections, failure of a railroad company to stop a train at a crossing, whereby a train on the intersecting track is struck and overturned, so as to kill a person walking by the side of the intersecting track, is negligence as to such person.

Appeal from City Court of Birmingham; Wm. W. Wilkerson, Judge.

Action by Allen Williams, as administrator of Sam Williams, deceased, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. P. Bradley and Bowman, Harsh & Beddow, for appellee.

DOWDELL, J. The appellee, Allen Williams, as administrator, sued the Southern Railway Company to recover damages for the alleged negligent killing of plaintiff's intestate, one Sam Williams. The complaint contained five counts; the first four being predicated upon simple negligence, and the fifth upon intentional wrong. With this last count we have nothing to do, since

*For authorities in this series bearing on the question presented by the principal case, see *Nichols v. Chicago, etc., Ry. Co. (Iowa)*, 14 R. R. R. 766, 37 Am. & Eng. R. Cas., N. S., 766; foot-note appended to *Illinois Cent. R. Co. v. McIntosh (Ky.)*, 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; foot-notes appended to *Texas & P. Ry. Co. v. Shoemaker (Tex.)*, 14 R. R. R. 594, 37 Am. & Eng. R. Cas., N. S., 594.

For authorities on the question as to what is, and is not, the proximate cause of an injury, see foot-note appended to *Haley v. St. Louis Transit Co. (Mo.)*, 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all the preceding authorities in this series are collected.

Southern Ry. Co. v. Williams

no questions are raised on it. In each of the first four is averred that the injury complained of occurred at the of the defendant's railroad tracks with the tracks of another different railroad. In the first and third counts the alleged negligence is averred as follows: "* * * And negligently or allowed said train to run into or against a train upon of said other railroad at said crossing, so that said train derailed," etc., whereby, as a proximate consequence, etc., the plaintiff's intestate, etc., was killed. In the second and fourth the alleged negligence is stated as follows: "* * * defendant negligently failed to cause said train to come to full stop within 100 feet of said crossing, or negligently or allowed said train to proceed before the way was clear as a proximate consequence thereof said train collided with other train upon said crossing," etc., whereby, as a proximate consequence, etc., the plaintiff's intestate was killed. In the first and second counts it is averred that at the time of the negligent act of the defendant, causing the injury complained of, the plaintiff's intestate "was near by, but not upon, the road upon which defendant was operating said train as said," etc. In the third count it is averred that the injury was inflicted "while he [plaintiff's intestate] was in the crossing, or about to cross, the said railroad upon which defendant was operating said train as aforesaid"; while in the fourth count the averment is, "while he [plaintiff's intestate] was engaged in or about crossing the railroad upon which the defendant was operating said train as aforesaid." To the several of the complaint demurrers were interposed by the defendant and the same were overruled by the court. Thereupon the defendant filed pleas numbered from 1 to 8 inclusive. Demurrers were sustained to the fourth, sixth, seventh, and eighth. The case was then had upon issue joined upon the other pleas, and a verdict and judgment in favor of the plaintiff. Upon the conclusion of the evidence, the same being without controversy, the trial court, at the request of the plaintiff in writing, gave the jury the general charge, with hypothesis to find for the plaintiff, and refused a like charge requested by the defendant in its entirety, also, the general charge as to each of the counts separately except as to the fifth count, and as to which the general charge was given in favor of the defendant. Other charges were requested by the defendant, but they do not call for our consideration, being insisted on in argument. As but one question is insisted on in argument by counsel for appellant, we need not review the rulings of the court on the demurrers to the complaint or the pleas separately. The one question insisted on was whether the injury was to be raised by the demurrers, and on charges requested by the plaintiff.

The facts, as shown by the undisputed evidence, were as follows: The defendant operated a railroad which intersected the Louisville & Nashville Railroad; the latter ran

Southern Ry. Co. v. Williams

ning north and south, and the former east and west. Plaintiff's intestate was walking along a path on the east side of, and parallel with, and close to, the track of the Louisville & Nashville Railroad, and going north to his place of business at the Birmingham Fertilizer Works, which were located near the Louisville & Nashville Railroad, north of the crossing of the two railroads. When plaintiff's intestate approached the crossing, a freight train of the Louisville & Nashville, going north, was making the crossing; and, continuing his journey along the path, he passed over the track of the defendant company, and, according to the varying estimates of witnesses, had gone anywhere from 15 to 50 feet beyond defendant's track, when a train on defendant's road, going from west to east, ran into the Louisville & Nashville train, cutting the same in two parts, demolishing one of the cars, and derailling and turning over another, which latter fell upon and killed said intestate. The defendant's train made no stop for the crossing, as required by the statute, but proceeded in violation of the same, though it is not pretended that defendant's servants, in the management of said train, had any knowledge of said intestate's proximity to said crossing. With this statement of the facts, we proceed to a consideration of the question presented and argued by counsel.

Counsel for appellant, in his brief, thus states the question involved: "The real point at issue between plaintiff and defendant was, and is, whether or not the failure to comply with the statute (section 3441 of the Code of 1896), under the circumstances of this case, was such a negligent failure of duty towards plaintiff's intestate as to constitute a legal cause of action in the plaintiff." Premitting consideration of any common-law duty, which under the circumstances of this case may have rested on the defendant independent of the statutory duty, since perhaps there may be no distinction in principle between a duty imposed by statute and one imposed by the common law as to the violation of either constituting an act of negligence, we will consider the question as presented by counsel. Section 3441 of the Code reads as follows: "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred feet of such crossing, and not proceed until they know the way to be clear; the train on the railroad having the older right of way being entitled to cross first." Section 3443 is as follows: "A railroad company is liable for all damages done to persons, or to stock or other property, resulting from a failure to comply with the requirements of the three preceding sections, or any negligence on the part of such company or its agents; and when any person or stock is killed or injured, or other property destroyed or damaged by the locomotive or cars of any railroad at any one of the places specified in the three preceding sections, the burden of proof, in any suit brought therefor, is on the railroad company to show a compliance with the requirements of such

Southern Ry. Co. v. Williams

braced in the classification suggested in argument by counsel for appellant, but a section hand at work upon the tracks, in close proximity, rightfully in such place, and who is injured as a proximate consequence of a collision of trains on the crossings, resulting from a failure to comply with requirements of the statute on the part of those operating the trains. Other supposable cases might be suggested, but these serve to illustrate the unreasonable construction of the statutes as insisted upon in argument. In the cases suggested, if the construction contended for by appellant's counsel were adopted, we would have a case of a violation of a duty enjoined by statute, and which is per se negligence, resulting proximately in the injury of a person rightfully in his place at the time of the injury, and who would be left without a legal cause of action. Under the facts in the case before us, there is no difference in principle between the case of plaintiff's intestate and the cases suggested above by way of illustration. It is unimportant whether plaintiff's intestate was injured while in the act of crossing defendant's railroad, or after he had cleared defendant's road; there being no imputable contributory negligence on his part. He had the lawful right to cross the defendant's road, with the duty upon him, of course, of exercising due care in crossing, without thereby becoming a trespasser or a bare licensee. He would be but exercising a legal right, and could not, therefore, be said to be in a place where he had not the lawful right to be. If he was injured after he had crossed the road of the defendant, and while on the premises of another, and it is not here shown that he was wrongfully on the premises of such other, and if that were material the burden of showing it would be on the defendant, he was nevertheless within the zone of danger from the collision of trains, and, not being shown to be wrongfully in such place, under our view he comes within the protection of the statute. Under the undisputed evidence, the plaintiff's intestate was neither a trespasser nor a bare licensee on the premises of the defendant. The doctrine, therefore, pertaining to that class of persons, and the authorities cited in support of the same, have no application.

The case of *A. G. S. R. R. Co. v. Chapman*, 80 Ala. 615, 2 South. 738, is more analogous in principle and facts to the case at bar than any other to which our attention has been called. But counsel for appellant challenges the correctness of the law of that case. In that case the plaintiff was walking along a path on the right of way of the railroad, and near the tracks, within the corporate limits of the town of Livingston, when she was injured by the defendant's train running upon a cow on the track of the railroad, and throwing the cow off and against the plaintiff. The negligence counted on was the failure of the defendant to comply with the statutory requirements of ringing the bell and blowing the whistle at intervals, when passing through the corporate limits of the town. It was held that the plaintiff had a legal cause of action. It was there said: "There being no neg-

Pharr v. Morgan's L. & T. R. & S. S. Co

train thereon when the draw was not closed, and navigation thereby interrupted for 3 1-2 months, held, that the company is responsible in damages to private individuals specially injured thereby.

Proximate Cause.—Where in such case the usual navigable channel was closed to steamboats by the half of the span, which remained stationary, and the company drove piling across the other channel for the purpose of repairing the structure and facilitating traffic, held, that the original negligent breaking, and not the work of réparation, was the primary and paramount cause of the injury.

Elements of Damages.—Where the obstruction to navigation was such that barges could pass, but steamboats could not, held, that the additional expense of an extra steamboat should be allowed as damages.

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by John Pharr against Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for defendant, and plaintiff appeals. Reversed.

Foster, Milling, Godchaux & Sanders, for appellant.
D. Caffery & Son and Denegre & Blair, for appellee.

LAND, J. Plaintiff sued to recover \$7,203.57 damages alleged to have been occasioned by the negligent obstruction of the navigation of the Atchafalaya river at Morgan City by defendant during the latter part of the year 1902.

The petition alleged that defendant had constructed, without authority from the Congress of the United States, a large railroad bridge on wooden piers across Berwick Bay at Morgan City, with a draw or turntable for the passage of boats, and that the same had been used by said company for a number of years; that in the latter part of the year 1902 the defendant, through its servants, agents, and employees, negligently, carelessly, and recklessly broke the draw span of the bridge, dumped several cars into the river, unlawfully obstructed the navigation at said point by driving piling where said bridge was broken, unnecessarily delayed the removal of said piling, and unnecessarily obstructed the navigation through said bridge for a period of three months.

The petition further alleged that plaintiff was a large sugar

[†]For the authorities in this series on the question as to what is, and is not, the proximate cause of an injury, see foot-notes appended to *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all the preceding authorities in this series are collected; *Birmingham Ry. Light & Power Co. v. Brantley* (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; *Snow v. New York, etc., R. Co.* (Mass.), 15 R. R. R. 47, 38 Am. & Eng. R. Cas., N. S., 47; *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, etc., R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

Pharr v. Morgan's L. & T. R. & S. S. Co

Secretary of War replied that he had no power to authorize the closing of the river to navigation, but that the department would not interfere if the navigation was not impeded for more than ten days; it being understood that the company would be liable for all injuries inflicted on private interests by reason of the interruption of navigation.

The defendant company thereupon drove pilings and erected the temporary structure, which closed the navigation of the river a few days after the bridge was broken.

The defendant company took steps to have the broken draw span repaired, but the work was not completed and the river opened to navigation until January 26, 1903, after having been closed by defendant's obstructions for at least 3½ months.

Plaintiff owned and operated a large sugar factory situated on the river, a few miles above the railroad bridge, and, in the usual course of his business, transported cane, raised and purchased by him below the bridge, in barges towed by a steamboat to his refinery. The tows necessarily passed through the open draw. Three weeks after the bridge was broken, plaintiff was ready to commence operations. His barges could pass under the framework of the bridge, but his steamboat could not. He was compelled to employ an extra steamboat to tow the barges to or from the bridge.

We concur in the opinion of the district judge that defendant company had the legal authority to erect and maintain said bridge across Berwick's Bay. In *Hamilton v. Railroad Company*, 34 La. Ann. 970, 44 Am. Rep. 451, decided in 1882, this court held that "the state Legislatures have unlimited power to erect bridges and railways and make any other works across navigable waters, subject only to the paramount authority of the national government"; citing a number of decisions of the Supreme Court of the United States and other authorities. In that case legislative authority to bridge navigable streams was implied from the power granted a railway company to build a road between two points in the state.

The district judge said:

"It is not disputed that the drawbridge was broken by the reckless and negligent act of the employee of the defendant."

He, however, held that, as such negligent breaking did not obstruct navigation, it cannot be considered as the direct and proximate cause of injury to plaintiff, which was occasioned immediately by the erection of the trestlework which was necessary for the lawful purpose of repairing the bridge. In other words, the district judge considered that the breaking of the bridge was the remote cause of the injury, though such negligent act rendered it necessary for the company, and in its own interest, to obstruct navigation in order to repair the damages to the structure. The district judge further held that the repairs were not unreasonably delayed, and that the temporary obstruction to navigation was not unreasonably continued.

Pharr v. Morgan's L. & T. R. & S. S. Co

river. We cannot concur in the proposition that a railroad company has the legal right to close a river to navigation for three months or more, for the purpose of repairing a bridge broken by its own negligence, or of facilitating its own business. The right of the public in a navigable stream is at least equal to the right of a railroad to cross the same, and this right to cross is subject to the condition that its bridge be so constructed and maintained as not to unnecessarily interrupt navigation. The case of *Hamilton v. Railroad Company*, 34 La. Ann. 940, 44 Am. Rep. 451, rests on a peculiar state of facts, which absolved the company from all blame. The draw had become rotten and unsafe. The stream was navigable only for a few months of the year. The company erected its temporary bridge at a time when the stream was not navigable, and had every reason to believe that its new bridge would be completed before the opening of navigation. But the work was unavoidably delayed by unexpected, unforeseen, and unprecedented rains, which at the same time produced an unusually early stage of navigable water in the river. The court, after reviewing the facts of the case, said:

"The delay was caused by accidents and circumstances over which the company had no possible control, and for which it cannot be held responsible in justice or in law."

In such cases, where the inconvenience to private parties is temporary and unavoidable, it is *damnum absque injuria*. Same case, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393.

We do not think that the doctrine can be extended to a case where the necessity for repairing a bridge was created by the negligence of a railroad company.

The case of *Briggs and Others v. Railroad Company*, 30 Hun (N. Y.) 219 (June term, 1883), is in point. There, while the draw was open, and a canal boat was passing through, the defendant carelessly and negligently ran a locomotive into the draw and upon the boat, sinking it, and thereby suspending all navigation at that place for a period of five days. Immediately after the accident the defendant proceeded with due diligence to remove the obstruction and repair the bridge. The owners of several canal boats were compelled to wait at the bridge until the obstruction was removed. Held, that they were entitled to recover.

In the case at bar the defendant, having negligently obstructed the navigation of the river, claims immunity from the consequences on the ground that the obstructions were partially removed from one of the channels, and it thereby was opened to navigation. When charged with closing the same channel, defendant replied that it had the legal right to do so for the purpose of making repairs to the bridge, and that the alleged injury resulted from the lawful work of repairing, and not from the original negligence in obstructing the channel.

The original negligence produced a certain injurious result;

Schwarz v. Delaware, etc., R. Co

tiff entered into an agreement with one Mr. Zenor, by which each furnished a steamboat, one to work above and the other below the bridge. It was agreed, however, that Mr. Zenor's work should have the preference. Mr. Zenor's work was not delayed at all. Plaintiff claims that his work was very much delayed. This may have been the result of his agreement with Mr. Zenor. Plaintiff was an experienced, practical planter, of large means, and abundantly able to buy or charter a steamboat, and yet he was satisfied with the arrangement as above described.

The damages claimed for delays are too uncertain and remote to be recovered.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that the plaintiff do have and recover of the defendant company the sum of \$1,695.75, with legal interest from this date, and costs in both courts.

SCHWARZ v. DELAWARE, L. & W. R. Co.

(Supreme Court of Pennsylvania, May 1, 1905.)

[61 Atl. Rep. 255.]

Railroads—Accident at Crossing—Questions for Jury.—In an action for death at a grade crossing, for the court to assume, in attempting to show by mechanical calculations, the contributory negligence of deceased, that the train was moving at a speed of 40 miles per hour, and the wagon at a speed of 2 miles per hour, if the evidence was disputed, was error. The question as to the respective speeds was for the jury.

Same—Duty of Railroad.*—Where a railroad company has erected gates at a dangerous crossing, it is its duty to slacken speed when the watchman is off duty and the gates open.

Same—Speed.†—Where a person crossing a railroad can only see a train approaching for 585 feet if he stops at the proper place, the railroad company should regulate the speed of its train so as to make it possible for a driver to cross in safety if he has stopped, looked, and listened at the proper place.

Appeal from Court of Common Pleas, Munroe County.

Action by Richard F. Schwarz against the Delaware, Lackawanna & Western Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

*For the authorities in this series on the subject of the duties and liabilities of railroads as affected by the presence or absence of flagmen or watchmen at crossings, see foot-notes appended to *Montgomery v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 274, 34 Am. & Eng. R. Cas., N. S., 274.

†As to the care required in operating trains at crossings where the view is obstructed, see *Dungan v. Wilmington City Ry. Co.* (Del.), 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746 (care required of motorman at crossing where view is obstructed); foot-note appended to *Nashville, etc., R. Co. v. Witherspoon* (Tenn.), 11 R. R. R. 740, 34 Am. & Eng. R. Cas., N. S., 740, where all the preceding authorities in this series are collected.

Schwarz v. Delaware, etc., R. Co

but to moderate, the speed of its trains when the watchman is off duty and the gates locked open." The evidence of the witnesses above quoted would seem to justify the inference of a failure of duty upon the part of the defendant company in this respect. In view of this testimony, the question of the rate of speed of the train was for the jury. Nor do we find that there was any evidence as to the speed of the wagon when passing over the crossing. The statement of the court is merely an inference from the testimony that the ordinary walking gait of the horses was about two miles an hour, and that they could not go up the ascent to the railroad tracks at much more than that.

The trial judge properly says: "In the absence of evidence as to whether these unfortunate young men did or did not stop, look, and listen before crossing the railroad, we must presume that they did. So, also, they are presumed to have stopped at the best place." It appears from the evidence that one desiring to cross the railroad at this point could only see a train approaching from the direction from which this train came for a distance of about 585 feet. Running at the rate of 40 miles an hour, the train would cover this distance in about 10 seconds, so that, if the driver stopped and looked and listened just before crossing the track, he might be caught before clearing the furthest track if so little as 10 seconds of time was required to go over the crossing. If the view of an approaching train was restricted to so short a distance as 600 feet or less, the defendant company was bound to take that fact into consideration, and to so regulate the running of its trains as to make it possible for a driver to cross the tracks in safety if, when just before entering upon them, he stopped, looked, and listened, and no train was within sight or sound. The evidence also shows that the conformation of the ground in the vicinity is a bluff along the railroad, and the rapids in the creek near by make a rumbling noise that somewhat resembles that of a train, so that it may be hard to distinguish between the noise of the water and that of a train coming around the curve.

What we said in *Cromley v. Penna. R. Co.*, 208 Pa. 445, 57 Atl. 832, is applicable here: "It cannot be said that the driver saw the train, or should have seen it, because it may have come into view in the 500 [here 585] feet to which his line of vision was at first limited, after he had looked and started to cross. It was probably moving twenty times as fast as he was, and, after coming into view, would cover the distance to the crossing before he could reach a place of safety. Nor can it be said by the court that he was negligent in not seeing and avoiding the train if it came into his view after he had started on. True, it was his duty to continue to look as he approached the track, but he may have been delayed by the condition of the crossing or by the rearing of his horses. Allowance must be made for these facts, and for his bewilderment of mind if, when committed to the act of crossing, he was suddenly confronted with an unexpected and alarming danger."

Fishburn v. Burlington & N. W. Ry. Co

trif was only chargeable with such a degree of care as a child of his age would be reasonably expected to exercise under similar circumstances.

Injury to Nervous System—Sufficiency of Evidence.—Where there was evidence that plaintiff's nervous system was seriously injured, an instruction that if the jury found a permanent impairment and destruction of his nervous system and the functions thereof, etc., was not erroneous; the word "destruction" being used not in the sense of a total loss of nerve force, but as meaning an enfeeblement or impairment which would mark plaintiff's condition through life.

Bishop and McClain, JJ., dissenting in part.

Appeal from District Court, Washington County; W. G. Clements, Judge.

Action to recover damages for personal injury. Judgment for plaintiff, and defendants appeal. Affirmed.

See 98 N. W. 380.

C. J. Wilson and H. & W. Schofield, for appellants.

H. M. Eicher and S. W. & J. L. Brookhart, for appellee.

WEAVER, J. At the time of the injury complained of, plaintiff was a child of the age of about six years. He lived with his father upon the residence property owned by the latter, bordering upon the defendant's right of way. This residence lot was inclosed by a fence, and that portion of it adjoining the right of way was used as a garden. By the consent of the father the railway company had for several years (during the winter season, at least) maintained a snow fence within the limits of his inclosure. The boundary fence between the right of way and the garden appears to have been constructed of posts and wire. The snow fence was made of boards, in panels of 14 or 16 feet in length. These panels were set on top of the ground, just inside the garden inclosure, and leaned up against the wire fence. To hold them in place, the ordinary method employed was to fasten the ends of the panels together with wire loops of some kind, and attach the top board or boards in the same manner to the fence posts. The evidence tends to show that a snow fence was thus constructed in the fall of 1899. On April 8, 1900, the plaintiff, with a brother about a year younger than himself, went into the garden to look at some pieplant roots or sprouts near the fence; and while there the wind blew over one or more of the board panels, one of which fell upon the plaintiff, injuring him very severely. The negligence charged against the defendant consists in its alleged failure to give the panels a sufficient slant to prevent their falling or being blown inward upon the garden,

Am. & Eng. R. Cas., N. S., 548; foot-notes appended to St Louis, etc., Ry. Co. v. Colum (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 307.

As to what is, and is not, the proximate cause of an injury, see foot-note appended to *Flaherty v. Boston & M. R. R. (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; Wabash R. Co. v. Billings (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; Denison, B. & N. O. R. Co. v. Barry (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; Denison & S. Ry. Co. v. Carter (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.*

Fishburn v. Burlington & N. W. Ry. Co

tached to the line fence were old, rusty, and unfit for this purpose. This conclusion is strengthened by the fact that the panels did blow over—a result which ordinarily would not follow, had they been well fastened to the panels, with new galvanized wire, within a period of four or five months, as claimed by the defendants. It is true, they may have been unfastened or removed without fault on defendants' part, but there is nothing in the testimony to show such a state of facts. It is very clear that the question of defendants' alleged negligence was properly left to the jury.

2. Error is assigned upon the ruling of the trial court in admitting the testimony of witnesses to the effect that for a considerable period after his injury the plaintiff would cry out and weep as if in pain, and would otherwise give manifestations of physical suffering, and complain from time to time that his broken limb hurt him. Under the frequent holdings of this court, there was no error in refusing to exclude this evidence. While there is a sense in which this class of evidence may be said to partake of hearsay and conclusion, it comes within the well-recognized exception which permits it to be given out of regard to the limitations of human language, which make it impossible to describe in apt terms all the manifestations upon which conclusions as to health, sickness, pain, and suffering are based. *Buce v. Eldon*, 122 Iowa, 92, 97 N. W. 989; *Reininghaus v. Association*, 116 Iowa, 364, 89 N. W. 1113; *Goldthorp's Estate*, 94 Iowa, 343, 62 N. W. 845, 58 Am. St. Rep. 400; *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Bailey v. Centerville*, 108 Iowa, 20, 78 N. W. 831; *Stone v. Moore*, 83 Iowa, 186, 49 N. W. 76; *Kostecky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591; *Abbot's Trial Ev.* (2d Ed.) 408; *Cleveland & C. R. R. v. Carey* (Ind. App.) 71 N. E. 244; *R. Co. v. Schmidt* (Ind. Sup.) 71 N. E. 201; *R. Co. v. Shanks* (Ala.) 37 South. 166. This rule is peculiarly applicable in the case of a child of such tender years as to render simulation and fraud improbable.

3. The court permitted the father of plaintiff to testify that he was a day laborer in a planing mill, and that his earnings were about \$2 per day. This, it is said, was prejudicial error, in that it tended to excite the sympathy of the jury in favor of the plaintiff, as the child of poverty engaged in a contest with a rich corporation. There seems to be no good ground for this contention. The plaintiff was still too young to have a fixed vocation in life. His damages, if entitled to recover, depended in some degree upon the business or occupation he would have been likely to adopt, had he not been injured, and upon the extent to which his injury impaired his ability or capacity to earn money in such business or occupation. While there is, of course, no certainty that the child would have adopted the vocation of his father, this court has held that the probability of such choice is sufficiently strong to permit evidence of this nature as an element to be considered in the computation of damages. *Walters v. R. R.*, 41

Fishburn v. Burlington & N. W. Ry. Co

panels were, without the knowledge or agency of the defendants, lifted back against the wire fence, from which position they fell upon the plaintiff, such act constitutes a sufficient intervening cause which relieves them from liability for the resulting injury. We have already reached the conclusion that there was evidence to sustain a finding of negligence on part of the defendants in construction of the snow fence, and that if, by reason of such negligence, the fence fell or was blown upon the plaintiff without fault chargeable to him, he is entitled to recover. From this starting point, let us proceed to inquire how the situation would be affected if the jury believed, as it might have done, under the evidence, that plaintiff and his young brother had found the panels upon the ground, and lifted them back into or near their original position, before the accident. In other words, assuming the negligence of the defendants in the construction of the snow fence, would the act of plaintiff and his brother in lifting the fallen panels and restoring them to their place without proper fastening be such an independent intervening cause as will break or interrupt the causal connection between defendants' negligence and the plaintiff's injury? The mere fact that another cause intervened between defendants' negligence and plaintiff's injury is not enough to relieve the former from liability if the intervening act was of such nature that its happening was to have been apprehended. Stated otherwise, the intervening cause will not relieve the original negligence of its actionable quality if the occurrence of the former might have been anticipated. *Thom. Neg.* (1st Ed.) 1089; *Sheridan v. R. R.*, 36 N. Y. 39, 93 Am. Dec. 490; *Osage v. Larkin*, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. Rep. 186; *Derry v. Flitner*, 118 Mass. 131; *Hill v. Winsor*, 118 Mass. 259; *Schumaker v. R. R.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 261. For instance, in *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508, the defendant sold loaded cartridges to two young boys. With these cartridges the boys loaded a toy pistol already in their possession, which weapon they left upon the floor of their home. Afterward a younger brother, six years of age, picked up the pistol and discharged it, receiving a wound from which he died. Here, in one sense of the word, the original negligence of the defendant had ceased to be operative. He did not furnish or load or discharge the pistol. The boys to whom he had sold the cartridges, and were the intermediate agents in loading the weapon, had discarded it. Lying where it had been left by them, it was harmless. The child, in picking it up, became an active agent in its own destruction. But conceding all this, the court held the defendant liable, saying: "Although the act of the lad intervened between the original wrong and the injury, we cannot deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong." While the facts in the cited case present a more flagrant act of negligence than is

Fishburn v. Burlington & N. W. Ry. Co

Iowa, 323, 42 N. W. 309, 14 Am. St. Rep. 284) as follows: "When there is danger of a particular injury which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act of exposing the person or thing injured to the danger." The annotator adds: "If we construe this principle with the one stated in the preceding paragraph [that the injury must be one which might reasonably have been anticipated], the result seems to be that when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind, the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act." To the same effect see *Quigley v. R. R.*, 142 Pa. 388, 21 Atl. 827, 24 Am. St. Rep. 504; *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Sauter v. R. R.*, 66 N. Y. 50, 23 Am. Rep. 18.

Counsel have discussed the question whether the intervening cause which will serve to relieve the primary negligence of its actionable quality must be an intelligent, responsible cause. Affirming this proposition, it is the contention of the appellee that the jury were at liberty to find that these children were too young and inexperienced to be charged with negligence, or otherwise held responsible for their act in replacing the fence, if they did replace it, and that such act would not prevent a recovery against the defendants if the charge of negligence in the construction of the fence has been established. That a young child is held to exercise only such care for its own protection as may reasonably and fairly be expected from one of its years and experience is too well settled to admit of argument. *Edgington v. R. R.*, 116 Iowa, 444, 90 N. W. 95, 57 L. R. A. 561; *R. R. v. Becker*, 84 Ill. 483. No court of modern times has gone to the extent of saying that under any state of circumstances a child of six years may be held guilty of negligence, as a matter of law. The instructions by the trial court to the jury upon this feature of the case were correct, and are not seriously questioned by the appellants. If, then, the jury may have found that the children were too young and immature to be charged with contributory negligence, it would seem to savor of hairsplitting to say that the same act which in an adult would be contributory negligence may, when done by a young child incapable of negligence, be treated as an independent intervening cause, depriving him of the right to recover for an injury which would not have happened but for the original negligence of the defendant. If the snow fence was negligently constructed, and the plaintiff had been a person of mature years, who had restored a fallen panel to its upright position, thus contributing to his own injury by a subsequent fall of the same panel, no lawyer would think of relying upon his act as an intervening cause interrupting the causal connection between the original negligence and the resulting injury, except so far as all contributory negligence may

Fishburn v. Burlington & N. W. Ry. Co

defendant, but the wrongful act of the third person who struck the horse; but Lord Tindal held otherwise, and permitted a recovery. In *Clarke v. Chambers*, 3 Q. B. D. 327, the cases are thoroughly reviewed by Chief Justice Cockburn, and the doctrine of *Lynch and Nurdin* expressly approved. The defendant negligently obstructed a carriageway by a bar armed with spikes, and placed across the track. Some third person, having occasion to use the carriageway, removed the bar, and stood it upright in the adjacent footpath. The plaintiff, traveling that way in the dark, came in collision with the obstruction thus created, and was injured. It was held that the act of the third person, though done without the knowledge or consent of the defendant, was something which might reasonably have been anticipated, and did not affect the defendant's liability. The theory upon which the action was prosecuted was expressly approved by the court, and is stated in these words: "As the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording the occasion for its being removed, and thus causing the injury to the plaintiff, he was responsible in the law for its consequences." If these cases were correctly decided—and we think they have the support of the great weight of authority and are sound in principle—and the act of the man who struck the standing horse, or the man who placed the spiked bar in the footpath, was not sufficient to interrupt the causal connection between the primary negligence of the defendant and the injury to the plaintiff, there can be no rule or reason for holding that the very natural act of young and irresponsible children in replacing the panel in the fence from which it had fallen will serve to relieve the defendants, as a matter of law, from any liability with which they might otherwise be charged on account of negligence in the original construction of the fence.

For other cases where the intervening act of a child has been held insufficient to prevent recovery, see *True v. Woda* (Ill.) 66 N. E. 369; *Dixon v. Bell*, 5 M. & S. 198; *Harriman v. R. R.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Kopplekorn v. Pipe Co.* (Colo. App.) 64 Pac. 1047, 54 L. R. A. 284; *Lane v. Atlantic Works*, 111 Mass. 136.

That the intervening cause which will serve to relieve the original negligence of its actionable quality must be a responsible cause, appears to be well established. Among the numerous authorities upon this point, see, in addition to those already cited: *Shearman & Redfield's Negligence*, §§ 31, 32, 36, 37; *Barrow's Negligence*, p. 21; *Wharton's Negligence*, §§ 87, 88; 1 *Thompson's Negligence*, § 64; *Lowery v. R. R.*, 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Lundeen v. Livingston* (Mont.) 41 Pac. 995; *Gilson v. Canal Co.*, note 26, 36 Am. St. Rep. 836.

In *Birmingham R., L. & P. Co. v. Hinton* (Ala.) 37 South. 635, we have a very late case which is quite parallel in principle with the one at bar. The plaintiff, an infant of tender years,

Fishburn v. Burlington & N. W. Ry. Co

found not only that appellants were negligent in building the fence, but that such negligence was the direct and proximate cause of the injury. It should be remembered, however, that "proximate cause" does not always mean the cause nearest in point of time. It means "closeness of causal relation, not nearness in time or distance." *R. Co. v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214; *Dickenson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281; *Brown v. R. R.*, 54 Wis. 343, 11 N. W. 356, 911, 41 Am. Rep. 41. The primary cause is the proximate cause, though it may act through successive instruments. *R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. It is not essential, therefore, for a plaintiff to show that an act claimed to have been the proximate cause of an injury was the only cause. It is sufficient if it be shown that the defendant's act produced or set in motion other agencies, which, in turn, produced or contributed to the final result. 8 Am. & E. Ency. L. (2d Ed.) p. 572; *Pollett v. Long*, 56 N. Y. 200; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Leame v. Bray*, 3 East, 595; *McDonald v. Snelling*, 14 Allen, 292, 92 Am. Dec. 768. Where two causes both of which are in their nature proximate combine to produce an injury, one of which causes being attributable to the negligence of the defendant, and the other not being chargeable to the negligence of either party, the plaintiff may recover. *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Manderschid v. Dubuque*, 25 Iowa, 109. Or in the language of Mr. Wharton: "We may consider it established that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury." Wharton's Neg. § 85.

We think, therefore, that it was not error to leave the question of proximate cause to the jury, and that the instructions given in respect thereto are correct.

6. It is complained that, in instructing the jury upon the assessment of damages, the trial court assumed that plaintiff's injuries were permanent; but we think the language employed, when fairly interpreted, does not convey this meaning. In this connection the court also made use of a sentence beginning as follows: "If you find, by a preponderance of the evidence, * * * a permanent impairment and destruction of the nervous system, and the functions thereof," etc. It is said in criticism of this language that there was no claim or proof that plaintiff's nervous system was destroyed. The use of the word "destruction" was perhaps not entirely fortunate, yet we think it not misleading. There is, of course, a sense in which it may fairly be said that the "nervous system" is incapable of destruction except by death of the body; but when the court, in referring to the results of a physical injury, speaks of "permanent impairment and destruction of the nervous system, and of the functions thereof," it obviously means such an enfeeblement or impairment

Chicago Terminal Transfer R. Co. v. Walton

from Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

See 72 N. E. 646.

Jesse B. Barton and John B. Peterson, for appellant.
Crumpacker & Moran, for appellee.

JORDAN, J. John S. Walton, an infant, commenced this action by his next friend, John W. Walton, in the Lake superior court. The cause was subsequently taken on charge of venue to the Laporte superior court. The action is to recover damages for personal injuries on account of the alleged negligence of appellant railroad company. The case was tried in the Laporte superior court by a struck jury, and a verdict returned in favor of appellee for \$8,500. On May 4, 1903, the court rendered judgment on this verdict. Appellant filed a motion for a new trial, which motion was overruled on September 21, 1903, and a transcript of the record in this appeal was filed in the Appellate Court on December 11, 1903. The alleged errors relied upon for a reversal are based (1) on overruling appellant's demurrer to the first and second paragraphs of appellee's amended complaint; (2) in denying the motion for a new trial.

At the very threshold, opposing counsel, in their brief, raise the question that the first and second assignment of errors, by which it is specifically alleged that the Laporte superior court erred in overruling the demurrer to the first and second paragraphs, respectively, of the amended complaint, is not sustained by the record, for the reason that it is disclosed therein that the demurrer to the first and second paragraphs of the amended complaint was overruled by the Lake superior court, and not by the Laporte superior court. This contention is fully verified by the record. No such ruling on demurrer as is specifically attributed to the Laporte superior court by the assignment of errors is shown by the transcript on file in this appeal. Consequently, under the circumstances, the point made by appellee's counsel that the first and second assignment do not present for review the decision of the Lake superior court in overruling appellant's demurrer to the first and second paragraphs of the amended complaint, is well taken. *Indiana, etc., Ry. Co. v. McBroom*, 98 Ind. 167, and cases there cited; *Smith v. Smith*, 106 Ind. 43, 5 N. E. 411; *Evansville, etc., Ry. Co. v. Lavender*, 7 Ind. App. 655, 34 N. E. 847; *Baldwin v. Sutton*, 148 Ind. 591, 47 N. E. 629, 1067, and cases cited; *Elliott's App. Proc.* § 306; *Ewbank's Manual*, § 127. If appellant had not specifically limited or confined the rulings on the demurrer to the Laporte superior court, a different question would be presented. *McKeen v. Porter*, 134 Ind. 483, 34 N. E. 223. It must follow, under the rule so firmly settled by the above authorities, that the ruling of the Lake superior court on the demurrer to the complaint is not presented for our consideration.

In order to obviate the deficiency in the assignment of errors,

Chicago Terminal Transfer R. Co v. Walton

signment of error, overruling the motion for a new trial, the point made by appellant, that the judgment is not sustained by sufficient evidence, ought not to be considered, for the reason that it has not recited in its brief the evidence given in the cause, as required by rule 22 of this court (55 N. E. v). It is also insisted that the rulings of the court in giving and refusing instructions of which appellant complains should not be considered, because it has further failed to comply with the above rule in not setting out in its brief the instructions in question, or a substantial statement thereof. While this latter contention may be said to be fully sustained, nevertheless we have overlooked appellant's omission in this respect, and have read and considered the instructions—both those given and refused—and discover no error. The charge, as a whole, is as favorable to appellant as it can rightfully demand. In fact, the court, by the instructions which it gave, fully and correctly advised the jury on the law pertaining to all material questions in the case. Some of the instructions tendered by appellant and refused are substantially embraced in those given, while others are not correct expositions of the law applicable to the case, under the evidence, and were properly refused on that ground. There are no substantial reasons to warrant a reversal of the judgment below on the instructions given or refused.

Counsel for appellee, by setting out in their brief the evidence in the case, have thereby supplied in that respect the omission which they attribute to appellant. Therefore it may be said that, by the joint action of the parties herein, the rule in respect to reciting the evidence has been satisfied. *Tipton, etc., Co. v. Dean* (Ind. Sup.) 73 N. E. 1082. We have not, however, confined ourselves to an examination of the evidence alone, as set forth in the briefs of the respective counsel, but have read and considered all of the testimony which is embraced in the bill of exceptions, and discover no reason for disturbing the judgment of the trial court for insufficiency of evidence.

There is evidence to establish that appellee, a boy about 9½ years old was injured at a crossing of a public street in the city of East Chicago, Lake county, Ind., by appellant company kicking a string of detached cars with much force over said crossing. It appears that the cars in question were kicked over this crossing with great force, without giving any notice or warning whatever to persons passing along the street at the point in controversy. Appellee, while passing over the crossing in question, was caught and run over by this string of cars, and was thereby severely injured. His left leg was broken, and his right leg was so bruised and crushed that amputation thereof was rendered necessary. He was injured in other respects, and the injuries which he received are shown to be of such a character as will cause him much suffering and disable him for life. It is true, as is usual, there is quite a conflict in the evidence. Nevertheless there is testimony to prove that the point where the accident happened

Miller v. St. Charles St. R. Co

by one of the electric cars of the defendant company going uptown. Royal and Marigny are narrow streets, 29 feet from curb to curb, and 10-foot sidewalks. The distance between the car track and the curb on Royal is 12 feet. The child, just before the accident, had been making mud cakes at the woods side, downtown corner of Royal and Marigny. It was off the sidewalk, somewhere on the line of the prolongation of the Royal street woods side sidewalk, or possibly within the property line, but, if so, very near it. The boy in whose charge it was was within a few feet of it on Marigny street, playing with a dead snake with other boys. Standing between the child and the coming car, and to some extent screening the child, were a large square telegraph post, three awning posts, and a trolley post, and there were two, and possibly more, persons standing on the sidewalk near the corner. The car came at the usual speed, which is pretty fast, and the child suddenly and unexpectedly ran in front of it, 5 to 10 feet ahead of it, and was run over.

We do not think a motorman is obliged to check the speed of his car whenever there are persons on the sidewalk or at the corner, and if a child comes suddenly and unexpectedly from behind, or from among, such persons, and runs upon the track right in front of the car, so that it is impossible to stop the car in time to save it, we do not think the railway company is responsible.

Three of plaintiff's witnesses say the child walked upon the track; but one of them says it ran fast, and so say defendant's witnesses. If the child had walked, we cannot conceive how some one of the persons standing so near would not have saved it.

Plaintiff's principal witness, Mrs. Casey, was on the sidewalk in front of the grocery which stands at the woods side, uptown corner of Royal and Marigny—that is to say, on the same side of Royal as the child—and was walking in the direction of the child and of the coming car. She did not see the car until it was upon the child, and did not see the motorman at all, her attention having been concentrated on the child; but she is positive that the motorman did not see the child until after it was on the fender, when his attention was attracted by her own exclamation. On the other hand, plaintiff's next principal witness (we say "next principal witness," because the others were youths who were playing with the dead snake), Louque Petrovitch, was opening oysters inside of his shop which stands at the riverside, downtown corner. Through the door he saw the car pass, and the motorman was then screwing the brake to stop the car. At that moment there intervened between the car and the child, first, the three or four feet between the door, through which the witness looked, and the property line; second, the 10-foot downtown sidewalk of Marigny street; third, the distance, whatever it was, between the downtown curb of Marigny street and the point where the car actually came in contact with the child. Mrs. Casey's statement as to the motorman's not having seen the child until it was on the fender is therefore contradicted by Petrovitch.

St. Louis & S. F. Ry. Co. v. Carlisle

distance before it was struck. The view along the track was clear for at least a quarter of a mile from the point the mule entered the right of way, and, at the speed the train was running, it was evidently far enough from the mule so that, if action towards slowing down had been earlier begun, the injury could have been avoided. Held, that defendant was liable.

Appeal from Circuit Court, Washington County; John N. Tillman, Judge.

Action by J. D. Carlisle against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. F. Parker and B. R. Davidson, for appellant.

Walker & Walker, for appellee.

HILL, C. J. This is an action against the appellant railroad company for negligently killing appellee's mule. There were a verdict and a judgment in favor of appellee. The court gave one general instruction, and it was in entire accord with the statute governing these cases. At the instance of appellant the court gave ten instructions, and refused three. Those given presented fairly every phase of the appellant's case which it was entitled to have considered, and some more favorably for it than the law authorized. The first one refused was a peremptory instruction which ought not to have been given. The next instruction refused stated that it was not negligence to run the train at 50 or 55 miles an hour. The court had just instructed, at instance of appellant, that the company was not required to run its train at a low rate of speed, as to one who owned stock and allowed it to range in the vicinity of the track. The last instruction requested which was refused stated that, if the rate of speed the train was operated was the sole cause of the injury, to find for the defendant. This was not the issue in the case, but the issue was one of care in the operation of the train—whether slow or fast—and that question was properly and fairly presented in instructions framed by the appellant.

On the evidence, the jury, if it believed plaintiff's witnesses, were amply justified in finding the verdict. The mule killed was on the right of way and track going from the train some distance before it was struck, and the vision along the track was clear at least a quarter of a mile from the point the mule must enter the right of way. At the rate of speed the train was running, it was evidently a sufficient distance away from the mule to have prevented the injury if action towards slackening the speed was earlier begun. In fact, it is doubtful if it was slackened at all.

Judgment affirmed.

Borneman v. Chicago, etc., Ry. Co

Same—Right to Allege Error.—Where, in an action against a railroad company for striking plaintiff's horse, defendant did not contend that plaintiff was guilty of contributory negligence as a ground for its motion for a directed verdict, it could not raise such objection on appeal.

Same—Damages—Value—Verdict.—Where, in an action against a railroad company for injuring plaintiff's horse so that it had to be killed, there was competent evidence that the horse was worth \$200, and the only evidence to the contrary was plaintiff's verified claim, in which the value was placed at \$100, which plaintiff explained by saying that he thought if he placed the value at such amount he might get something without suit, the verdict in plaintiff's favor for \$200 was not excessive.

Appeal from Circuit Court, Minnehaha County.

Action by E. A. Borneman against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Hosmer H. Keith, for appellant.

HANEY, J. This is an action to recover damages for the loss of a horse belonging to the plaintiff through the alleged negligent operation of one of defendant's trains. The issues involved are thus stated by the learned circuit court in its charge, to which no exceptions were taken: "The evidence in this case shows that the horse was not struck at a crossing, but was struck upon the right of way, upon the track where there was no crossing, on private grounds, and on the railroad right of way. The horse was therefore a trespasser, and it was not the duty of the locomotive engineer, or of the brakeman, or any of its servants to keep a lookout for the horse; and they are not guilty on account of any failure to see the horse; but if the engineer did see the horse, and saw that it was in close proximity to the track, and liable to be hurt, then it was the duty of the engineer to use reasonable care and precaution to avoid, if possible, the injury. He was not bound to keep any lookout in order to see if any stock was there, but he was bound to stop the train and prevent injury if he did see the stock in time to enable him by exercising reasonable care to do so. In addition to other evidence in this case, there has been introduced an ordinance of the city limiting the speed of railroad trains within the city limits to six miles an hour. This is simply introduced along with the other evidence that you may weigh and consider it. The railroad company was not per se necessarily negligent because it may have run the train at a greater rate of speed than six miles an hour; but the question of whether that rate of speed was dangerous to stock that might be along the right of way—whether they were negligent in regard to the speed of the train—is a question of fact for you to determine, taking into consideration all the facts and circumstances, including the evidence of the ordinance introduced on that subject. But the fact that the city has an ordinance limiting the speed of trains to six miles an hour does not of itself

Borneman v. Chicago, etc., Ry. Co

the horse was thrown up on the pilot of the engine, and carried along a short distance, and rolled off right side of the track in the ditch on my side. * * * Q. You may state whether it was possible, from the time you saw that horse until he was struck, to have stopped that engine and that train of cars. A. No, sir. It was impossible. Q. You may state whether or not you did all in your power to stop it. A. I did in the length of time I had. * * * Q. Where was the horse when you first saw it? A. On the south side of the track, on the left-hand side. I was on the north side. Q. You may state to the jury whether you were on the lookout. A. I was, most assuredly; yes, sir. * * * Q. When you first saw the horse, what did you do? A. I pulled the throttle, and by that time we had him. The horse made a jump for the track, and all I had time to do was to pull the throttle. I did not apply the air brakes because I saw I had the horse, and it was useless to apply the air brakes then." He also testified that the train was running not to exceed 15 miles per hour, and that it could have been stopped within a distance of 300 feet.

On the day before the trial a horse was taken to the point near the track where the plaintiff's wife and son swore the injured horse was standing when the train approached, and persons who walked on the track from that point eastward for more than 1,500 feet were permitted to testify that this horse, standing 25 feet either way from the track, could be seen plainly the entire distance. Evidence on the part of the plaintiff in rebuttal, tending to prove the distance the engineer could have seen live stock on or near the track at the time of the accident, was competent. *Sheldon v. Ry. Co.*, 6 S. D. 606, 62 N. W. 955. The evidence introduced for that purpose was undoubtedly the best which the nature of the case afforded, and no error was committed in receiving the same. While it was not the engineer's duty to be on the lookout for trespassing stock, it appears from his own testimony that he was in fact looking forward along the track as the train approached the place where the accident occurred, and that the train could have been stopped within a distance of 300 feet. If, as plaintiff's testimony tended to prove, the animal was within the engineer's line of vision while the train was moving a distance of more than 1,500 feet, it is certain he could have seen it in time to have avoided the accident, and the jury were at liberty to believe he did, notwithstanding his positive statement to the contrary. *Sheldon v. Ry. Co.*, supra; *Lighthouse v. Ry. Co.*, 3 S. D. 518, 54 N. W. 320. Therefore the learned circuit court committed no error in overruling defendant's motion for a direction of the verdict.

John Barber, called on behalf of the plaintiff, testified that he was near the track where and when the accident occurred; that his business was carpentering and farming; that he had seen trains run; that he had ridden on them a great deal; and that he knew something in regard to speed of trains from having seen

Borneman v. Chicago, etc., Ry. Co

and ridden on them. He was permitted, over defendant's objections, to state that in his judgment the train was running at the rate of at least 30 miles an hour. One of defendant's employees had sworn on direct examination that it was running at its usual rate of speed; another, on cross-examination, without objection, that it was running between 12 and 15 miles per hour. The matter of speed, whether material or not, having been thus introduced, it was certainly not error to receive further competent testimony touching the same subject. All statements concerning the speed of trains, except where the witness observes the time actually occupied in running a known distance, are necessarily expressions of opinion. By close observation and frequent tests any person may become proficient in estimating the speed of moving objects. "It has frequently been held that those who have habitually observed the passage of railroad trains may give an estimate of their rate of speed, and that the testimony on the subject is not confined to experts." 2 Jones, Ev. § 364. The question involved is not one of science, but of observation. *Detroit Ry. Co. v. Van Steinburg*, 17 Mich. 99. But, assuming that all persons are not competent to testify on the subject, it was for the trial court to determine whether this witness possessed the requisite qualifications, and its ruling should not be reversed in the absence of palpable error. *Waterhouse v. Brewing Co.*, 16 S. D. 592, 94 N. W. 587. Such error does not appear.

It is contended that the court erred in permitting the introduction by the plaintiff of certain sections of an ordinance prohibiting a greater rate of speed than six miles an hour, and requiring the bell to be rung continually on all engines while running within the city limits. Many cases lay down the rule that the violation of a statute or ordinance constitutes negligence per se, or conclusive evidence of negligence. The rule of other cases seems to be that the violation of a statute or municipal ordinance is prima facie evidence of negligence. In still other cases the courts have been content with the announcement that evidence of the fact that the defendant's act constituted the violation of a state or municipal law is proper for the consideration of the jury in determining whether the defendant was in fact negligent. 21 Am. & Eng. Ency. Law (2d Ed.) 478, 479. As the last-mentioned view—the one most favorable to the defendant—was taken by the court below in its charge to the jury, to which no exceptions were preserved, it is not necessary in this case to determine which should prevail in this jurisdiction, and no error was committed in permitting the ordinance to be received, provided it was within the issues raised by the pleadings. The negligence relied upon is thus charged in the complaint: "That the said defendant, by its agents and servants not regarding its duty in that respect, so carelessly and negligently ran and managed one of its locomotives with a train of cars attached thereto that the same ran against and over said horse of the plaintiff, and maimed and injured the same so that it became entirely worthless, and

Borneman v. Chicago, etc., Ry. Co

was thereupon and on the same day killed by the servants and employees of defendant, to plaintiff's damage in the sum of \$200." The language of the pleading hardly could be more general and comprehensive. The declaration is, in effect, that defendant's train was negligently operated, which clearly includes disregard of rules relating to speed and giving of signals. If defendant desired to be informed in what particulars it was charged with having failed to properly operate its train, it should have moved to have the complaint made more definite and certain. The section of the ordinance relating to speed was not irrelevant, though not specially pleaded, and defendant's objections to its introduction were properly overruled.

Reversible error cannot be predicted upon the introduction of the provision of the ordinance regarding the ringing of the bell because, like the provision relating to speed, it was within the issues; and, in the absence of any exceptions to the charge or request to charge on that subject, defendant cannot maintain that it was given undue consideration by the jury. Moreover, under the circumstances of this case, the matter was immaterial because of the statute on the same subject alluded to by the court in its instructions to the jury.

As no instructions were requested and no exceptions were taken to the instructions given by the court, it must be assumed, for the purposes of this appeal, that all material issues of fact were properly submitted to the jury, and the defendant is not in position to contend that the plaintiff's negligence contributed to the injury, that ground not having been included in its motion for a direction of the verdict.

The verdict, which was for \$200, is claimed to be excessive. There was abundant competent evidence showing the horse to have been worth that amount, to which nothing was opposed except a statement of claim against the company verified by the plaintiff, wherein its value was placed at \$100, in explanation of which the plaintiff testified that only \$100 was claimed simply because he thought "if he put the price clean down" he might get something without suit. The statement, if competent for any purpose, was merely an admission which did not preclude other proof of the animal's fair market value, and the effect of which was entirely overcome, if credit be given the plaintiff's very reasonable explanation. As we view the evidence, there was no room for controversy concerning the proper amount of damages.

The judgment of the circuit court is affirmed.

AYERS *v.* WABASH R. CO.

(Supreme Court of Missouri, Division No. 1, June 15, 1905.)

[88 S. W. Rep. 608.]

Railroads—Private Crossings—Duty to Give Signals.*—There being no statute requiring a railroad to give a signal on approaching a private crossing, its failure to sound the bell or whistle on approaching such a crossing is not negligence per se, but whether it is negligence or not depends upon the circumstances of the case.

Same—Injuries to Trespassers—Contributory Negligence.†—An intoxicated man, who seats himself on the end of a cross-tie on the main track of a railroad, and there sinks into a drunken stupor, is negligent.

Same—Duty of Engineer—Lookout—Use of Track by Pedestrians.‡—A locomotive engineer is bound to be on the lookout for persons using the track at a place where it is, to the railroad's knowledge, habitually used for a footpath, but is not chargeable with notice that a man is liable to be lying on the track at such a place, and the mere fact that the engine strikes a man so lying on the track is not of itself sufficient to justify the inference that the engineer saw him, or failed to use ordinary care to discover him in time to prevent injuring him.

Evidence—Conclusions of Witness—Visual Powers.—Testimony that on a clear day one could see a "small object" at a certain place on a railroad track from a standpoint of a quarter or half mile is incompetent unless it is the result of an actual experiment.

Appeal from Circuit Court, Carroll County; Jno. P. Butler, Judge.

Action by Montie B. Ayers against the Wabash Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John T. Barker and Conkling & Rea, for appellant.
Geo. S. Grover, for respondent.

VALLIANT, J. Plaintiff was struck by a locomotive on defendant's railroad, and suffered personal injuries. He brings this suit for damages. The negligence ascribed to the defendant in the petition is failure to sound the bell or whistle on approaching

*See foot-notes appended to *Nichols v. Chicago, etc., Ry. Co.* (Iowa), 14 R. R. R. 766, 37 Am. & Eng. R. Cas., N. S., 766.

†For the authorities in this series on the subject of the contributory negligence of intoxicated persons, see foot-notes appended to *Vizachero v. Rhode Island Co.* (R. I.), 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172.

‡As to the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171; *Maysville & B. S. R. Co. v. McCabe* (Ky.), 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358.

Ayers v. Wabash R. Co

the point where plaintiff was, and failure of the engineer to use the appliances at hand to stop the train in time to avoid striking the plaintiff after seeing him in a position of peril, or after the engineer, by ordinary care, might have seen him. The petition states that defendant's track was, and had been for many years, a well-recognized public path for pedestrians, with the knowledge and consent of defendant, and that plaintiff was on the track when he was struck, but it omits to say what he was doing, or in what position he was. The answer was a general denial and contributory negligence.

The evidence for the plaintiff tended to prove as follows: Defendant's railroad runs north and south through the town of La Plata. There is a well-beaten footpath in the track, and for many years the people in that vicinity, men, women, and children, habitually used the path in going to and from the town. About a mile south of La Plata there is a private crossing over the railroad, called "Gates' Crossing." From that point, looking south, the track for a half mile or more is level and straight, with nothing to obstruct the view. In the afternoon of a clear day, January 8, 1902, the plaintiff had been to town, became intoxicated, and started home, walking in the footpath in the track, going south. When he got as far as Gates' Crossing he sat down on the west end of a cross-tie, and then and there all consciousness ceased, and his memory of events ended. A regular north-bound passenger train, running about 40 miles an hour, came along, and struck him, inflicting serious injuries. As the engine approached Gates' Crossing, there was no signal given by bell or whistle. The train ran a quarter of a mile past the crossing before it stopped, then backed, and took the plaintiff on. Gates' Crossing was constructed by cross-ties laid lengthwise the track and plank on the ties. The plaintiff was sitting on the west end of a cross-tie a few feet north of the crossing. Sinnock, the only witness for the plaintiff near this crossing at the time of the accident, testified that he was approaching the track from the east, and when he got within about 35 yards of the crossing he saw the train coming from the south, and waited for it to pass. He did not see the plaintiff until after the accident. There was evidence tending to show that this train, running at the rate of 30, 35, or 40 miles an hour, as some of the witnesses thought it was, could have been stopped within 300 or 400 feet. The plaintiff called as a witness the engineer who was operating the locomotive at the time of the accident, and interrogated him on two subjects; that is, asked him how the engine was equipped, and what kind of a day it was. Then the witness was turned over to attorney for defendant for cross-examination, and was examined in regard to the accident, in which examination he stated: That when at his post on a level, straight track he could see from a half to three-quarters of a mile ahead. That this track was level and straight for about a quarter of a mile south of Gates' Crossing. That on this occasion he was at his post on the east side of

Ayers v. Wabash R. Co

the cab, looking north. He was running a little over 40 miles an hour. At that speed the train could not be stopped shorter than within 600 or 700 feet. That he did not see the plaintiff until he was within 150 feet of him. The plaintiff was then lying on the west side of the west rail, his body showing about 5 or 6 inches above the rail. As soon as he saw him, he used every effort and means at hand to stop, but it was too late. It was then impossible to stop in time to prevent striking him. The position of the plaintiff on the track was such that the witness could not have discerned him sooner than he did. At the close of the plaintiff's evidence the court, at the request of defendant, gave an instruction to the jury to find for the defendant. The jury rendered a verdict accordingly, and the judgment for defendant followed. The plaintiff has appealed.

The only question for decision is, was the plaintiff entitled to have his case submitted to the jury under instructions authorizing a verdict in his favor under any view of the evidence? The plaintiff insists that the testimony of the engineer to the effect that he was at his post and looking, yet did not see him until it was too late, and that as soon as he discovered him he did everything possible to avert the injury, is not the plaintiff's evidence, and did not justify the court in giving the peremptory instruction. The proposition is that the engineer was the plaintiff's witness only in reference to the subjects on which he was examined by plaintiff, and as to the rest he was defendant's witness. The question of latitude allowed in cross-examination of an adversary's witness has led to the adoption of one rule in some jurisdictions and a different one in others. A distinguished text-writer on this subject calls one the "orthodox rule," and the other the "federal rule" (3 Wigmore on Evidence, § 1885 et seq.), and quotes for the orthodox rule *Fulton Bank v. Stafford*, 2 Wend. 483-485: "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defense by him without calling any other witness. If he is a competent witness to the jury for any purpose, he is so for all purposes." For the federal rule the same text-writer quotes from Judge Story in *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535: "(The answers in controversy were inadmissible) upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the case." What is there called the "orthodox rule" has always been the rule in this state. *Page v. Kankey*, 6 Mo. 433; *Railroad v. Silver*, 56 Mo. 265; *State v. Jones*, 64 Mo. 391; *State v. Soper*, 148 Mo. 234, 49

Ayers v. Wabash R. Co

S. W. 1007. The learned author above named, after an exhaustive discussion of the subject, says, in section 1895: "The rule under consideration is concerned solely with the order of presenting evidential material. The assumption is that the fact may be proved on direct examination at a later stage, and the only question is whether it may be elicited during the earlier stage." That is really the only essential difference in effect between the two rules. Under what is called the "federal rule," the defendant may cross-examine the plaintiff's witness on the subject of his examination in chief, and afterwards, when defendant comes to introducing his evidence, he may recall the witness, and examine him on other subjects, making him as to those matters his own witness. Under our rule the defendant need not wait until the time for introducing his evidence has come, but may examine the witness before he leaves the stand on other subjects; yet as to these other matters he is the defendant's witness. The testimony is the defendant's, and not the plaintiff's. *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. 784; *State ex rel. v. Branch*, 151 Mo. 622, loc. cit. 641, 52 S. W. 390; *Anderson v. Railroad*, 161 Mo. 411, 61 S. W. 874. In such case, if the plaintiff had by other evidence made out a prima facie case, the court could not take it from the jury on account of testimony brought out by defendant in the examination of the plaintiff's witness touching matters that had not been referred to in the direct examination. Such testimony would be the same, in effect, as if the witness had, as in conformity with the federal rule, come down from the stand, and been recalled by the defendant after the plaintiff had closed his case. The only difference, as the text-writer above quoted says, is in the order in which the testimony is introduced. Involved in this subject is the question of the right of plaintiff to cross-examine the same witness on the new subject on which the defendant has examined him, and the right of the plaintiff, after having closed his case in chief, to bring out testimony not strictly in rebuttal by examining defendant's witnesses on subjects upon which defendant had not examined them. Those questions, however, are not in this case, but they are scientifically discussed by the text-writer above quoted, citing and reviewing numerous decisions on the subject.

It is not clear, however, from the record in the case at bar, that the plaintiff did not make this engineer his witness on the disputed point. He asked him if his engine was equipped with modern appliances, and if it was not a bright day. The only significance of the modern appliances was the facility for stopping the engine, and the only point to be attained in proving that the day was clear was to show that the engineer must have seen the man on the track, if he was at his post and doing his duty. We have thus discussed the subject of the examination of an adversary's witness not because it is a vital question in this case, but because the counsel on both sides have discussed it in their briefs; for, even if all that the plaintiff claims on that point be

Ayers v. Wabash R. Co

conceded, and if we disregard entirely the evidence the engineer gave on cross-examination, the plaintiff made out no case for the jury.

There is no statute requiring the defendant to give a signal by bell or whistle on approaching a private crossing. Its duty to do so depends on the circumstances of the case. There was therefore no negligence per se in failing to sound the bell or whistle. The plaintiff was guilty of negligence in placing himself in the position of danger. And, taking the plaintiff's own account of his condition, it leaves little room to infer that the sound of the bell or whistle would have had any effect on him. This reduces the case to a question of whether the engineer, after seeing the plaintiff in the position of danger, or after he could have seen him if he had been looking, could, by the exercise of ordinary care, with the means at hand, have avoided the accident. The evidence showed that although this occurred on defendant's right of way, and where there was no public crossing, yet it was where the defendant knew that the public was in the habit of using the railroad track for a footpath, and therefore it was the duty of the engineer to be on the lookout for persons so using the track. If this man had been walking or standing on the track, he could have been seen by the engineer in time, at least, for a danger signal to have been given; but, lying as he was on the west side of the track, he was not as conspicuous as a person walking or standing would have been. The engineer was not chargeable with notice that a man was liable to be found lying on the track, and therefore the fact that the engine struck the plaintiff in that position is not in itself sufficient to justify the inference either that the engineer saw him or that he failed to use ordinary care to discover him in time. The plaintiff's testimony, aside from that of the engineer, does not undertake to expressly show his attitude. He sat down on the west end of the cross-tie, and there the stupefaction of intoxication overcame him, and there the plaintiff's evidence leaves the result to inference. The natural inference is that he fell into a recumbent position.

Some of plaintiff's witnesses said that from a standpoint a quarter or half mile south on a clear day one could see a "small object" at Gates' Crossing. The term "small object" in that connection is indefinite, and means nothing. Besides, unless the witness is giving the result of an actual experiment or experience, the evidence is incompetent. Given a straight, level track, and a clear day, the jury were as competent as the witnesses to say how far a given object could be seen. The only witness of plaintiff (not counting the engineer) who was near enough to the accident to have seen the plaintiff on the track if he had been visible to ordinary observation said he did not see him until after the accident, although he saw the train coming, and waited for it to pass.

There is no room for the application of the humanitarian doc-

Wood v. Boston Elevated Ry. Co

trine in this case. The learned trial judge had the right view of the subject.

The judgment is affirmed.

BRACE, C. J., concurs. MARSHALL and LAMM, JJ., concur in the result, but are of the opinion that the engineer put on the stand by plaintiff was plaintiff's witness throughout, and all his testimony in chief, as well as on cross-examination, was to be taken as part of plaintiff's case.

WOOD v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 18, 1905.)

[74 N. E. Rep. 298.]

Accident on Street Railway Track—Questions for Jury.—In an action against a street railroad for injuries, evidence examined, and held that whether defendant was negligent, or plaintiff was guilty of contributory negligence, were questions for the jury.

Same—Contributory Negligence—Law of Road.*—It is not negligence, as matter of law, to drive on the left-hand side of a street.

Exceptions from Supreme Judicial Court, Suffolk County; Edgar J. Sherman, Judge.

Action by one Wood against the Boston Elevated Railway Company. There was a verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Moses I. F. Reuben, for plaintiff.

R. A. Sears, Jas. F. Sweeney, and *Howard A. Wilson*, for defendant.

MORTON, J. This in an action of tort to recover for injuries sustained by the plaintiff in consequence of a collision of one of the defendant's cars with a team which he was driving, whereby he was thrown off and injured. At the close of the evidence the defendant requested the court to order a verdict for the defendant, which the court declined to do, but submitted the case to the jury, which returned a verdict for the plaintiff. The case is here on report. If judgment should have been ordered for the defendant, it is to be so entered; otherwise judgment is to be entered on the verdict.

The questions are the usual ones of due care on the part of

*As to the care required of those driving other vehicles on streets upon which street cars are operated, see foot-notes appended to *Richmond P. & Co. v. Allen* (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; *Sullivan v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 512, 34 Am. & Eng. R. Cas., N. S., 512; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *McGauley v. St. Louis Transit Co.* (Mo.), 11 R. R. R. 247, 34 Am. & Eng. R. Cas., N. S., 247; *Hogan v. Winnebago Traction Co.* (Wis.), 11 R. R. R. 232, 34 Am. & Eng. R. Cas., N. S., 232.

Dalin v. Worcester Con. St. Ry. Co

the plaintiff, and negligence on the part of the defendant. We do not see how it could have been ruled, as matter of law, that the plaintiff was not in the exercise of due care, or that there was no evidence of negligence on the part of the defendant. The plaintiff was on the left-hand side of the road, and turned to cross the defendant's tracks, as it was necessary that he should do, in order to go in the direction in which he wanted to go. Before attempting to cross, he leaned out of his team and looked back, and saw a car approaching about 300 or 350 feet away. Judging it safe to do so, he turned the horses to cross the track, and almost immediately the team was struck by the car just behind the forward off wheel, and he was thrown off. The plaintiff was not negligent, as matter of law, in being on the left-hand side of the street (*Galbraith v. West End St. Ry.*, 165 Mass. 572, 43 N. E. 501); and the question whether, taking all the circumstances into account, he was in the exercise of due care, was eminently a question for the jury. So, too, was the question whether the motorman was negligent, and whether the collision was due to his carelessness. The testimony as to the speed of the car was conflicting; some of the witnesses testifying that it was going at a good rate of speed, and the testimony tending to show that the team was twisted round, and that the car went two or three lengths after striking the team, and that the pole and whiffletree were broken by the force of the collision. There was also testimony tending to show that the gong was not sounded; that the street was well lighted and the team was plainly visible. These and other circumstances, including the possible condition of the motorman, rendered it impossible to order a verdict for the defendant, as requested.

Exceptions overruled.

DALIN *v.* WORCESTER CONSOL. ST. RY. CO. (two cases).
(Supreme Judicial Court of Massachusetts, Worcester, June 21, 1905.)

[74 N. E. Rep. 597.]

Landlord and Tenant—Places Adjoining Premises—Permission to Use—Licensee—Child Playing on Car Barn—Care Due from Railroad.*—Defendant owned a tenement block adjacent to a car barn owned by it. The roof of the car barn was partly inclosed with a fence, and inside the inclosure there were certain conveniences for tenants, and children living in the tenements were permitted to play there. The portion of the roof outside of the inclosure was not intended for the use of tenants, and part of it consisted of a glass

*As to who are licensees, see foot-notes appended to *Booth v. Union Terminal Ry. Co.* (Iowa), 14 R. R. R. 768, 37 Am. & Eng. R. Cas., N. S., 768.

As to the care due licensees, see foot-note appended to *Lovett v. Gulf, etc., Ry. Co.* (Tex.), 11 R. R. R. 339, 34 Am. & Eng. R. Cas., N. S., 339; *Bishop v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 328, 34 Am. & Eng. R. Cas., N. S., 328 (care due by stander assisting passen-

Dalin v. Worcester Con. St. Ry. Co

skylight. The fence around the inclosure was removed in repairing the roof, and a child rightfully visiting in one of the tenements fell through the skylight while playing on the roof. Held that, as the child was playing on a part of the roof which was not intended for the use of tenants, he was at most a mere licensee, to whom defendant owed no duty except to refrain from wanton injury or from setting a trap for him.

Same—Same—Same—Removal of Fence.—The removal of the fence to make the repairs did not constitute an invitation or permission to the tenants to use the roof outside of the original inclosure.

Same—Same—Invitation to Use.—The fact that children were seen playing upon the roof by defendant's employees did not constitute an invitation or permission from defendant to use the roof, especially in view of the fact they had been ordered to keep off by defendant's superintendent.

Exceptions from Superior Court, Worcester County; Chas. A. De Courcy, Judge.

Separate actions of tort by Charles A. Dalin, as administrator of the estate of Ernie F. Dalin, deceased, and by Charles A. Dalin, individually, against the Worcester Consolidated Street Railway Company. Verdicts were directed for defendant in each, and plaintiff excepted. Exceptions overruled.

Grosvenor Calkins, for plaintiff.

Francis H. Dewey, Chandler Bullock, and Chas. C. Milton, for defendant.

MORTON, J. These are two actions of tort founded on alleged negligence on the part of the defendant. The first is an action by the plaintiff, as administrator of his son, a boy of six years and two months, to recover for personal injuries, and the second is an action by the father to recover for loss of services and medical and funeral expenses. At the close of the plaintiff's evidence the court, on defendant's motion, directed a verdict for it in each case. The cases are here on exceptions by the plaintiff to this ruling.

The defendant owned a five-tenement block in Worcester. It had a car barn extending along one side of and in the rear of

ger at conductor's request); *Sullivan v. Minneapolis, etc., Ry. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725 (no duty owed to person who goes to station, at night, to see her husband, who, she supposed, was there on business, with respect to condition of platform); *McConkey v. Oregon R. & Nav. Co.* (Wash.), 12 R. R. R. 267, 35 Am. & Eng. R. Cas., N. S., 267 (duty to keep railroad bridge in repair for use of); *Hortenstine v. Virginia-Carolina Ry. Co.* (Va.), 12 R. R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616 (railroad owes to trespassers and licensees no duty of providing safe appliances); *Means v. Southern Cal. Ry. Co.* (Cal.), 13 R. R. R. 411, 36 Am. & Eng. R. Cas., N. S., 411 (care due licensees on depot premises).

Negligence in maintaining dangerous places which are attractive to children, see foot-note appended to *Kansas City, etc., R. Co. v. Matson* (Kan.), 12 R. R. R. 675, 35 Am. & Eng. R. Cas., N. S., 675.

As to the liability of railroad companies for injuries to children as affected by failure to fence, see foot-note appended to *Lake Shore & M. S. Ry. Co. v. Liidtke* (Ohio), 10 R. R. R. 682, 33 Am. & Eng. R. Cas., N. S., 682.

Dalin v. Worcester Con. St. Ry. Co

the block. The roof of the barn was covered with gravel, and a portion of it was floored with wooden boards and inclosed with a picket fence. Children of the families living on the second and third floors played in this inclosure, which was also used by the tenants in the second story as a place for drying clothes. There was also within the inclosure a garbage chute, used by all of the tenants of the building, and a flight of stairs leading to a passageway which led to the street, which was likewise used by the tenants. The passageway was roofed over and lighted in part by a skylight outside of the inclosure. The accident occurred June 17, 1901, and was occasioned by the child's falling through this skylight. In April the end of the fence adjoining the garbage chute, and a portion of the back of the fence, had been removed by the defendant in connection with repairs on the roof of the barn, and had not been replaced at the time of the accident. There was testimony tending to show that, after the fence was thus removed, children played on the roof outside of the inclosure, and had been seen by employees of the defendant, and had been ordered by the superintendent to keep off. On June 17th the boy's mother was employed to wash for her sister, who occupied the entire third floor, and, with the consent and at the invitation of the sister, the boy's mother arranged to have the boy spend the day with her at her sister's. During the afternoon the boy played with other children in the tenement, and also on the roof, the mother looking after him at frequent intervals. Shortly before supper she called to him to come in. He did not obey, and, shortly after, she went to call him again, and found him sitting on the skylight. She called him, and watched him till he went around the corner by the garbage chute. After she returned to the kitchen the boy went back to the skylight and fell through the glass, and received the injuries from which 21 days later he died.

We assume that the defendant owed the same duty to the deceased that it owed to the tenants of the building and the members of their families. *Wilcox v. Zane*, 167 Mass. 302, 45 N. E. 923. But it is plain that the roof of the barn outside of the inclosure was not intended to be used by the tenants of the block, and we think that the removal of the fence in connection with the repair of the roof did not constitute an invitation or permission to them to use it. At most, the boy was a mere licensee, and the defendant owed him no duty except to refrain from wanton injury or from setting a trap for him. *McCoy v. Walsh*, 186 Mass. 369, 71 N. E. 792; *Sullivan v. Boston & Albany R. R.*, 156 Mass. 378, 31 N. E. 128; *Wright v. Boston & Albany R. R.*, 142 Mass. 296, 71 N. E. 866. The fact that children were seen playing upon the roof by employees of the defendant did not constitute an invitation or permission from the defendant, especially when taken in connection with the further fact that they had been ordered to keep off by the superintendent.

Exceptions overruled.

ST. LOUIS, I. M. & S. RY. CO. v. KIMBERLAIN.

(Supreme Court of Arkansas, June 17, 1905.)

[88 S. W. Rep. 599.]

Actions—Injuries to Stock—Sounding Alarm—Questions for Jury.—In an action against a railroad for killing a cow, whether the engineer had time to sound the stock alarm after discovering the cow held, under the evidence, a question for the jury, notwithstanding the engineer's statement that he did not have sufficient time.

Same—Duties of Engineer—Lookout.*—A higher degree of care is required of railroads in running a train at a high rate of speed through a town than when going through the open country, and the engineer while passing through a town, should be on the alert, and prepared for instant action in case stock stray upon the track.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by J. C. Kimberlain against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant.

RIDDICK, J. This is an appeal from a judgment against the defendant for damages for killing a cow belonging to plaintiff. The cow was struck and killed by a passenger train on the 19th day of April, 1902. The train was passing at the rate of 40 miles an hour through the town of Tuckerman early in the morning of that day, and the cow came from behind an icehouse about 20 or 30 feet from the track. The engineer testified that he did not and could not see the cow until it came from behind the icehouse, going towards the track, and that it was then too late to do anything to avoid striking it. He did not sound any stock alarm, and there was evidence tending to show that no bell was rung for the crossing. It seems clear from the engineer's testimony that it was too late after he saw the cow to do anything towards checking the speed of the train, and he says that he did not have time to even give the stock alarm. But he stated that he did not know whether the cow was walking or running, nor does he state how far the train was below the crossing at the time he first saw the cow. As the cow was 20 or 30 feet from the track at the time she came from behind the icehouse, with a ditch between her and the track, it would seem that unless she was running very fast he could have sounded the stock alarm, as that can be done in an instant. He states that he did not have time to do this, but that statement was in the nature of an opinion. As he did not go into particulars, and

*As to the duty of trainmen to lookout for stock on or near tracks, see foot-note appended to *Central of Georgia Ry. Co. v. Sport* (Ala.), 14 R. R. R. 774, 37 Am. & Eng. R. Cas., N. S., 774; *Airikainen v. Houghton County St. Ry. Co.* (Mich.), 14 R. R. R. 178, 37 Am. & Eng. R. Cas., N. S., 178.

St. Louis, etc., Ry. Co. v. Coombs

show how near the train was to the cow, or whether the cow was walking or running, we think the facts are not definitely enough shown for us to say, as a matter of law, that the jury had no right to disbelieve his statement that he did not have time enough to sound a stock alarm. A higher degree of care is required in running a train at such a high rate of speed when passing through a town than when going through an open country. The engineer, while passing through this town, should have been on the alert, prepared for instant action, and whether, by so doing, he might have sounded the stock alarm, was, we think, properly left to the jury under the facts proved.

Judgment affirmed.

ST. LOUIS, I. M. & S. Ry. Co. v. COOMBS et al.

(Supreme Court of Arkansas, June 17, 1905.)

[88 S. W. Rep. 595.]

Appeal—Findings—Review.—In an action for the destruction of a building by fire, a finding on conflicting evidence that defendant's engine passed the building on the day of the fire is conclusive on appeal.

Railroads—Fires—Emission of Sparks—Presumptions.—Where an engine passed near inflammable material immediately before the discovery of the fire, the jury, in the absence of proof explaining its origin, may infer that it originated from sparks from the engine.

Same—Prima Facie Case—Negligence.*—Where it is shown that fire originated from an engine of defendant, a prima facie case is made for plaintiff, casting on defendant the burden of exonerating itself from negligence.

Same—Presumption of Negligence.—In an action for the destruction of a building by fire, where it appeared that the fire was communicated from an engine, and the evidence tended to show that an engine equipped with proper appliances and operated with due care would not emit sparks of sufficient size to ignite inflammable material, the jury were warranted in finding either that the engine was not so properly equipped, or that it was not operated with due care, and that defendant had not rebutted the presumption of negligence raised against it.

Evidence—Weight and Sufficiency—Credibility of Witnesses.—In an action for destruction of a building by fire, the jury need not accept as conclusive the statement of witnesses that the engine was in good order and carefully operated, though they were not contradicted, but may consider all the evidence bearing on the condition of the engine and the mode of operating it, and the circumstances under which the fire occurred.

Railroads—Fires—Spark Arresters—Duty to Provide.†—A railroad company discharges its duty if it exercises reasonable care in providing its engines with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and they are in good condition.

Battle, J., dissenting.

*See foot-notes appended to *Dyer v. Maine Cent. R. Co.* (Me.), 14 R. R. R. 757, 37 Am. & Eng. R. Cas., N. S., 757; *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

†See foot-notes appended to *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

St. Louis, etc., Ry. Co. v. Coombs

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Action by E. F. Coombs and another against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Appellee Coombs was the owner of a cotton compress plant, consisting of building and machinery, in the city of Batesville, near the track of appellant's railroad, which was destroyed by fire on May 5, 1902, between 3 and 4 o'clock in the afternoon. It was not then in operation as a compress, and had a lot of hay stored in the building—some of it scattered loose over the floor—and there were cracks about two inches wide in the walls. The property was insured in the sum of \$1,200 against loss by fire under a policy issued by appellee Sun Insurance Company, and that company paid Coombs the sum of \$1,193.41 in satisfaction of a claim under the policy for loss on the property. This suit was brought by Coombs and said insurance company against appellant to recover the value of said property, which is alleged to be the sum of \$4,000. It is alleged that the fire was caused by sparks which were by appellant's servants negligently permitted to escape from its locomotive while passing near the building. Appellant, in its answer, denied that it had been guilty of negligence, and denied all the other allegations of the complaint. The jury returned a verdict in favor of plaintiffs for \$1,000, and defendant appealed.

B. S. Johnson, for appellant.

Neill & Neill and *Arthur Neill*, for appellees.

MCCULLOCH, J. (after stating the facts). Appellant challenged the sufficiency of the evidence to support a verdict for plaintiffs by a request to the court for a peremptory instruction in its favor. The plaintiffs introduced several witnesses who testified that a short while before the building was discovered to be on fire (the precise time, according to these witnesses, varies from 10 to 20 minutes) they saw the engine pass near the building. This is denied by the engineer and brakeman, who testified that they did not go down the track as far as the compress building that day, but the preponderance of the evidence seems to be against them; and the jury, in returning a verdict in favor of the plaintiffs, necessarily found that the engine did pass the building, and, there being a substantial conflict in the testimony, we are concluded on this point by the verdict.

The building is shown to have been about 34 feet from the track on which the engine is said to have passed, and no other means appears by which the fire could have been communicated. The fire occurred on Monday, and no person had been seen in the building since the preceding Saturday, when the man in charge securely fastened it. In order for the railroad company to be held liable for the damage, the fire must have been communicated by sparks from the engine, and the escape of sparks

St. Louis, etc., Ry. Co. v. Coombs

must have resulted from negligence on the part of the company or its servants either in the construction or operation of the engine. This court has held that from proof that an engine passed near inflammable material immediately before the discovery of fire, there being no evidence to explain its origin, the jury may infer that the fire originated from sparks from the engine. *Railway Co. v. Dodd*, 59 Ark. 317, 27 S. W. 227. In that case the court said: "The cotton was liable to take fire from these trains and communicate it to the depot. One of them passed ten or fifteen minutes before it was destroyed. The cotton caught fire, and the depot was consumed by it. These were facts from which the jury might have inferred that the fire originated in sparks from the engine of the train which had just passed, there being no evidence to explain its origin upon any other theory. All these facts tended to show that the property of appellees was destroyed through the negligence of appellant, and are sufficient to sustain the verdict of the jury in this court." This enunciation is in line with many adjudged cases on the subject. *Burke v. L. & N. Ry. Co.*, 7 Heisk. 451, 19 Am. Rep. 618; *Karsen v. M. & St. P. Ry. Co.*, 29 Minn. 12, 11 N. W. 122; *Woodson v. M. & St. P. Ry. Co.*, 21 Minn. 60; *Hagan v. Railroad Co.*, 86 Mich. 615, 49 N. W. 509; *Johnson v. Railway Co.*, 77 Iowa, 667, 42 N. W. 512; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Fremont v. London & Northwestern R. Co.*, L. R. 6 C. P. 14; 3 *Elliott on Railroads*, § 1243. When it is proved that the fire originated from an engine of the defendant railroad company, a prima facie case is made for the plaintiff, and it then devolves upon the railway company to exonerate itself from the charge of negligence. *Railroad Co. v. Payne*, 33 Ark. 818, 34 Am. Rep. 55; *Tilley v. St. L. & S. F. Ry. Co.*, 49 Ark. 535, 6 S. W. 8; 3 *Elliott on Railroads*, § 1244.

The jury having found upon legally sufficient evidence that the fire was communicated by sparks escaping from the engine, the next inquiry presented is whether appellant overcame the presumption of negligence arising therefrom. The engineer and yard watchman and the regular fireman, who was off duty the day of the fire, testified that they examined the engine immediately after the fire, and found the spark arrester in good condition. Three days later the engine was examined at Newport by an expert from the shops of appellant at Baring Cross, who testified that the spark arrester was of the most approved pattern in use, and was then in good condition. Mr. Luttrell, the superintendent of locomotives of appellant company, testified that the kind of spark arrester on the engine in question was the most approved in practical use, and that, "if it was in good condition at the time—the parts all tight in their places, screwed up as they belong, and no holes or apertures that were not made in them"—sparks or cinders of sufficient size to ignite anything could not, in his opinion, escape. He said: "I do not think it possible for sparks from an engine equipped like this to set fire

St. Louis, etc., Ry. Co. v. Coombs

to hay from a spark falling 35 or 40 feet." The engineer testified also to the effect that an engine equipped with that kind of spark arrester would not, unless there was some defect or break in it, throw sparks large enough to set fire to anything. There was no testimony on the part of appellant as to the manner in which the engine was being operated when it passed the building, as the witnesses introduced denied that they passed down by the compress at all.

So the case stands thus: From the fact that the engine passed near the building a few minutes before the fire, and its origin cannot be accounted for upon any other theory, a conclusion is warranted that it was communicated from the engine; and it is shown by said agents of appellant that a spark arrester of approved pattern, in good condition, such as is in common use, will not emit sparks of sufficient size to ignite inflammables. Against this, the witnesses introduced by appellant testified, without contradiction by direct testimony, that the engine was provided with a spark arrester of the most approved kind in use. Therefore, when it was established that fire had been communicated from the engine, and there was testimony tending to show that an engine equipped with proper appliances and operated with due care would not emit sparks of sufficient size to ignite inflammable material, the jury were warranted in finding either that the engine was not so properly equipped, or that it was not operated with due care, and that appellant had not rebutted the presumption of negligence raised against it. Upon this state of the proof, it cannot be said that the verdict of the jury was without evidence sufficient to support it. The Supreme Court of Iowa, in the case of *Johnson v. Railway Co.*, supra—similar to this—said: "Counsel for defendant maintain that there is an utter failure of proof that the defendant's engines said to have set out the fire were negligently handled or were not in good repair and condition. In reply to this position, it need only be said that one of defendant's witnesses—a locomotive engineer who was in charge of one of the engines from which it was claimed the fire escaped—testified that an engine in good repair could not throw fire a distance from the track to the place the fire caught in the grass. As has been said, the fires could have originated from no other source. The jury were authorized to infer from this evidence that the engines were not in good repair." In *Hagan v. Railroad Co.*, supra—a case also similar to this, where the origin of the fire was unexplained, except by the proximity of the engine, and the railroad operatives had testified that the engine was properly equipped and skillfully operated, and that such an engine when so operated could not throw sparks—the court held that there was sufficient evidence to go to the jury, saying: "Testimony cannot be said to be undisputed when inconsistent with some other fact or circumstance, either established, or regarding which testimony has been admitted. The court very properly declined to take the case from the jury,

St. Louis, etc., Ry. Co. v. Coombs

or to pass upon the conclusiveness of the testimony offered by the defendant." The Supreme Court of Minnesota, in the case of *Karsen v. M. & St. P. R. Co.*, supra, which was quite similar to this on the facts, said: "A verdict cannot be said to be unsupported by the evidence when, taking the entire evidence together, it will fairly and reasonably warrant the conclusion arrived at. Neither is a jury necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the facts and circumstances in evidence bearing upon the condition or mode of operating the engine, and upon the accuracy of witnesses." See, also, *Solum v. Great Northern Ry. Co.*, 63 Minn. 233, 65 N. W. 443; *Burud v. Great Northern Ry. Co.*, 62 Minn. 243, 64 N. W. 562.

Error is assigned by counsel in the giving of several instructions by the court, but we find no error in them. It is especially urged that the court erred in giving the seventh instruction asked by plaintiffs, wherein the jury were told that they were not bound to accept as conclusive the statement of witnesses that the engine was in good order and carefully operated, although there might be no direct evidence to contradict them, but that they should consider all the circumstances and evidence bearing upon the condition of the engine and mode of operating it, and the circumstances under which the fire took place. We think this instruction correctly stated the law, and follows the language used in some of the decisions we have cited herein.

Complaint is also especially urged against the oral instruction of the court on the ground that it holds the railroad company to the absolute duty of providing the most approved appliance for the preventing the escape of fire, instead of holding it merely to the duty of exercising ordinary and reasonable care and diligence in providing the best known appliances in practical use. We do not think that the instruction is open to that objection. The instructions, taken as a whole, correctly state the law to the jury—that the company had discharged its duty if it "had exercised reasonable care in providing its engine with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and that said appliance and contrivances were in good condition."

The judgment is affirmed.

BATTLE, J., dissents.

FARRELL v. ERIE R. CO.

(Circuit Court of Appeals, Second Circuit, April 6, 1905.)

[138 Fed. Rep. 28.]

Railroads—Injury of Person at Crossing—Contributory Negligence.—Plaintiff, a boy 16 years old, approached on foot a crossing of double tracks of defendant's railroad over a street. After crossing the street the tracks curved sharply, and took a direction at right angles to their former course. Plaintiff's testimony showed that before going upon the crossing he looked in both directions along the track, which on the side of the curve he could see as far as a tunnel 1,300 feet away. There was no train in view from that direction, but one was approaching from the other on the further track, and he waited until it had passed, and then, looking along the other track and seeing no train, he started to cross, but was struck by a train coming from the opposite direction, and injured. There was thick smoke coming from the train which passed, and settling near the ground, and the train itself as it rounded the curve obstructed the view on the other track, except for perhaps 150 feet. There was also evidence that the train which struck plaintiff was moving at a speed of 15 miles an hour, in violation of a city ordinance, which prohibited a speed greater than 6 miles. Held, that in view of such evidence, and the noise made by the train which had passed, the question of plaintiff's contributory negligence was one of fact for the jury.

Same.*—A person approaching a railroad crossing in a city is not bound to anticipate that an approaching train will proceed at an unlawful or an unusual rate of speed, and is not chargeable with negligence, as matter of law, in attempting to cross, if, in view of the distance at which the track seems to be clear, he would have time to cross before a train going at the usual and lawful speed would reach the crossing.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Writ of error by the plaintiff in the court below to review a judgment entered upon a verdict directed by the court in an action brought to recover for injuries received at a highway crossing. The trial judge directed a verdict for the defendant upon the ground that the evidence established contributory negligence on the part of the plaintiff, and refused the request on behalf of the plaintiff to submit that issue to the jury. Error is assigned of that ruling.

J. B. Ker, for plaintiff in error.

Chas. MacVeagh, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The question whether the case was one which should have been submitted to the jury upon the issue of the contributory negligence of the plaintiff is the only one which has been argued at the bar.

*See *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294 (right to presume that street car is not running at a speed prohibited by ordinance).

Farrell v. Erie R. Co

The evidence upon the trial tended to show the following facts: Near the intersection of Monmouth street and Twelfth street, Jersey City, and a few feet westerly of the westerly line of Monmouth street, two parallel tracks of the defendant's railroad cross Twelfth street at right angles, and curve sharply to the westward, until they join the main lines of the defendant's road, when they run practically due west, and enter a tunnel distant about 1,300 feet from the crossing. Both Twelfth street and Monmouth street, as shown upon the map which was used upon the trial, are narrow streets, being about 30 feet wide. The plaintiff, a lad 16 years of age, was proceeding on foot, on the afternoon of a clear day, along the south side of Twelfth street, going west intending to cross the tracks. After he reached Monmouth street he looked to the left, and saw no train coming, though he could see the tracks unobstructed as far as the tunnel. Then he looked to the right, and saw a short freight train coming on the further track, which was going west towards the tunnel. He stopped and waited until it had passed and had got about 12 feet beyond the crossing. Then he looked again, saw the near track was clear to the westward as he thought for a distance of 100 feet, and started to cross; but as he got on the first track he was struck by a train coming from the westward. Thick smoke was coming from the locomotive of the train going towards the tunnel, and settling near the track; and the train itself while rounding the curve would preclude a person standing on Twelfth street near the westerly line of Monmouth street from seeing a train coming from the westward on the nearer track more than 150 feet away. The evidence did not distinctly show how far the plaintiff was from the track when he finally looked to see if a train was approaching and started to cross. If he had reached the westerly line of Monmouth street, he would have been about 10 or 12 feet from the track. There was testimony that the train which struck the plaintiff was going at a speed of about 15 miles an hour.

Upon these facts we think the trial judge erred in taking the case from the jury. The testimony of the plaintiff indicates that he was a fairly intelligent lad, and if his narrative was true he approached the crossing without undue haste, and did not attempt to cross the tracks until he had looked, waited until one train had passed, looked again to see if he could cross safely, and discovering, as he supposed, that he could do so, went forward. It is not impossible that the smoke of the locomotive of the freight train obscured his view so that while the train was rounding the curve he could not have seen the approaching train more than 100 feet away. The noise of the freight train sufficiently explains his failure to hear the approach of the other train. If he was on the westerly line of Monmouth street when he made his final start to cross the track, he could have crossed, going leisurely, in about 5 seconds, and probably less. If the train that struck him had been moving at a speed of 6 miles an

Farrell v. Erie R. Co

hour, it would have been about 11 seconds in covering the 100 feet. By one of the ordinances of the city it was unlawful for the defendant to propel its trains across any street within the city limits at a greater speed than 6 miles an hour. The engineer of the locomotive which struck the plaintiff testified that the customary speed of the defendant's trains at that place was at the rate of 5 or 6 miles an hour. If the train was in fact making a speed of 15 miles an hour, it would have traversed the 100 feet in about $4\frac{1}{2}$ seconds.

The plaintiff was bound to use ordinary care, which was to be greater or less, according to the circumstances in which he was placed, and the dangers which a person of ordinary prudence would have reason to apprehend. He was not required to anticipate that an approaching train of the defendant would proceed at an unlawful rate of speed, or at an unusual rate of speed, or at a rate of speed dangerous in view of the relative location of the crossing and the curve. If, estimating the distance at which the track seemed to be clear, the time it would take a train to travel that distance proceeding at the usual speed, and the time it would require to cross the track in safety, a person of ordinary prudence would under the same circumstances have considered it safe to cross, the plaintiff was justified in attempting to do so. Unless the jury would not have been warranted in finding that ordinary care would forbid an agile lad to attempt to cross a railway track which he could pass in five seconds, when no train was in sight for a distance which a train proceeding at ordinary speed would cover in twice that time, the question of contributory negligence was not one of law, but one of fact. Irrespective of any arithmetical calculations based upon time and distance, if it was true that the plaintiff just before he stepped upon the track looked to see if any train was approaching, and did not see one, or if he did see the approaching train, and in that respect testified untruly, but nevertheless supposed that it was far enough away to permit him to cross the track without incurring any substantial risk, the question whether his attempt was one which an ordinarily prudent person would not have made was a question upon which fair-minded men might reasonably differ. Some weight is to be given to the presumption that those who are crossing a track in front of an approaching train, guided by the instinct of self-preservation, will not place themselves in imminent peril of life and limb by making the attempt without allowing a proper margin of safety. Reasonably prudent pedestrians not infrequently cross tracks near which they are standing in front of slowly approaching trains, and sometimes when the train is seen not to be more than 150 feet, or even 100 feet, away; and unless it can be said that to do so is negligent per se, it is for a jury to consider the various circumstances which give character to the particular act and assign it to its proper category. When different inferences fairly may be drawn from the facts, and different minds may be led reasonably to different conclu-

Southern Ry. Co. v. Carroll

sions upon the evidence, it is error to take the question of negligence from the consideration of the jury.

The evidence upon the trial presented an improbable, but not an impossible, case. It seems improbable, if the boy had looked as he said he did, that he could have failed to see the approaching train when at a distance of 150 feet; yet if, owing to the smoke, he could not see it until it was within 100 feet, and he looked and did not see it, the accident may have happened substantially as he testifies it did. Although he may have been near enough to the track to cross with apparent safety, nevertheless if it be true, as some of the testimony indicated, that the train was moving at the speed of 15 miles an hour, it is not wholly incredible that it could have overtaken him before he passed over.

The judgment is reversed.

SOUTHERN RY. CO. v. CARROLL.

(Circuit Court of Appeals, Fourth Circuit, May 29, 1905.)

[138 Fed. Rep. 638.]

Railroads—Crossing Accident—Signals—Question for Jury.—Where, in an action for injuries to a traveler at a railroad crossing, the evidence as to whether the railroad company gave statutory signals at the crossing was conflicting, such question was for the jury.

Same—Care Required.*—A traveler approaching a railroad crossing is bound to give way to a train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety.

Same—Contributory Negligence—Statutes.†—Where a traveler, knowing of the existence of a railroad crossing, approached it at night, in a carriage with drawn side curtains, without looking or listening for the approach of a train, which was within sight and hearing, and he took no precautions with reference thereto until he was on the track, he was guilty of "willful contributory negligence" precluding a recovery, within a state statute declaring that, if a person is injured by collision with a railroad train at a crossing, and it appears that the railroad neglected to give statutory signals, which contributed to the injury, it shall be liable for damages, unless the person injured, in addition to a mere want of ordinary care, was guilty of gross or willful negligence which contributed to the injury.

*As to whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of a train which is seen by the traveler to be approaching before he makes the attempt, see foot-notes appended to *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575; *Hornstein v. Rhode Island Co.* (R. I.), 14 R. R. R. 401, 37 Am. & Eng. R. Cas., N. S., 401; foot-note appended to *Roefeldt v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470, where all the preceding authorities in this series are collected.

†For the authorities in this series on the subject of the combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Birmingham Ry. L. & P. Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165.

Southern Ry. Co. v. Carroll

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

C. P. Sanders, for plaintiff in error.

Jos. A. McCullough (*J. C. Wallace* and *H. J. Haynsworth*, on the briefs), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. John L. Carroll, the plaintiff below, brought this action against the Southern Railway Company, the defendant below, alleging that whilst he was in the act of driving, with his horse and buggy, across the railroad of the defendant, at a public crossing in the suburbs of Union, S. C., on the 2d of April, 1900, at 9 or 10 o'clock at night, the said defendant, by its servants and employees, negligently caused a locomotive drawing a train of cars on its railroad to run against, into, and upon him, the plaintiff, killing his horse, breaking his buggy, and injuring him in person; and in his suit the said plaintiff seeks to recover damages for the alleged injury both to himself and his property. The cause was tried in the Circuit Court for the District of South Carolina, at Charleston, before a jury. A verdict was rendered in favor of the plaintiff, assessing his damages at \$900, and judgment accordingly rendered. The case comes to this court by writ of error sued out by the Southern Railway Company, the defendant.

Several exceptions were taken in the course of the trial, and to the charge of the court, all of which appear of record, and assignments of error thereon have been presented by counsel for our consideration. We are of the opinion, however, that, in order to dispose of the case, we need only to pass upon the question as to whether or not the plaintiff, upon his own statement, was entitled to recover. At the close of the testimony the defendant's counsel requested the court to direct a verdict for the defendant, on the ground, in substance, that plaintiff's evidence was not sufficient in law to warrant his recovery. The court declined to give this instruction, to which refusal the defendant's counsel excepted. The plaintiff, John L. Carroll, who was a witness in his own behalf, testified substantially: That in the spring of 1900 he was engaged in grading foundations for the Buffalo Cotton Mills, about three or three and a half miles from the town of Union, S. C. That during the time he had been engaged in the work, which was three or four weeks, he had been to the town of Union on several occasions, and had crossed the Southern Railway tracks, about the corporate limits of the town, six or eight times. That on the 2d of April, 1900, he came to Union on business, about 4 or 5 o'clock in the afternoon. He traveled in a top buggy, drawn by one horse. He met some friends in Union that afternoon, and went with them to the 7:45 p. m. train, on which they were leaving, to see them off. Some half or

Southern Ry. Co. v. Carroll

three-quarters of an hour later he hitched his horse to the buggy, and started home. The night was very cloudy, the wind was blowing, and the side curtains to the buggy were buttoned down. That he had bought some sardines and crackers, which were on the seat by his side, and he does not remember whether at the time of the accident he was eating them or not. That he was driving along the public road in a "dog trot," when all at once he heard a train, and just as he saw the headlight he discovered that his horse was on the track, and that he did not have time to cross. He undertook to pull his horse to the left, down the track, but before he could do this the engine struck him, killing the horse, knocking the top off the buggy, and otherwise injuring it, and throwing the plaintiff out upon the ground. Upon cross-examination the plaintiff admitted that he knew the railroad was there, about the limits of the town; that he had crossed it several times in the daytime at the same place, where he was attempting to cross that night. He further admitted that he drove steadily along in a "dog trot," as he described it, and did not look or listen to see whether he was approaching the railroad, or whether there was a train nearby; and that his horse was on the railroad track before he saw or heard the train, which was then so closely upon him that he could not escape. It was a fact, undisputed on the trial, that the headlight upon the engine of the train was burning.

The principle point of contention at the trial seems to have been whether or not the engineer complied with the provisions of a South Carolina statute which requires that a bell shall be rung or a whistle sounded upon all moving trains at the distance of at least 500 yards from the place where a railroad crosses any public highway, or street, or travel place, and be kept ringing or whistling until the engine has crossed such highway, or street, or travel place; and a further statute of South Carolina which provides that, if a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury. There were several witnesses introduced, both by the plaintiff and the defendant, who testified in regard to the ringing of the bell and sounding of the whistle on the train which came in collision with plaintiff's horse and buggy. The witnesses in behalf of the plaintiff principally gave testimony of a negative character upon this point—that is, they stated that they lived in the vicinity, but did not hear the bell or the whistle upon the train—though some of them stated that they

Southern Ry. Co. v. Carroll

heard the roaring of the train when it was half a mile away, and another that she heard the noise of the train at least five minutes before it reached the crossing. On the other hand, the engineer on the train testified directly that he sounded the whistle and rang the bell as required, and his testimony was corroborated affirmatively by other witnesses who were in the vicinity at the time of the accident. But, although it seems to us that the weight of the testimony as to the fact whether or not the proper signals were given was with the defendant, it is not our province, nor was it the right of the judge presiding at the trial, to determine this question; that being a matter for the jury. Assuming that the engineer failed to give the proper signals in approaching the crossing where plaintiff was injured, is the latter entitled to recover? The relative rights of railway companies and of persons traveling on a highway at a point where it crosses a railroad on the same grade are well settled. The traveler is required to give way to any train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety. Both parties are equally bound to use ordinary care to avoid or prevent injury. It is made incumbent upon the engineer approaching a highway crossing to be on the lookout, and to give sufficient signals of the approach of the train by ringing the bell, or sounding the whistle, displaying headlights, or in such other way as may be usual; and statutes which require that bells shall be rung and whistles sounded in approaching a highway crossing have been upheld as reasonable and necessary regulations in the operation of railroads, and the failure to observe them has been held to be negligence. Whilst these duties devolve upon the railroad company, it is a rule of law that a traveler who knows, or who has had reasonable opportunity to know, and ought to know, that he is about to cross the track of a railroad, must look and listen for approaching trains before even attempting to cross the track, and he must begin to look and listen at such distance from the track as to enable him to stop in case he hears an approaching train. *Shearman & Redfield on Law of Negligence*, vol. 2, § 476. "If the unexplained evidence shows that the injured person could certainly have seen the train in ample time to avoid it if he looked, it is conclusively to be presumed that he did not look, or did not heed, and he is to be held negligent as a matter of law. It is no excuse for failure to look and listen that the traveler did not think just then about the railroad, or its danger, or that his attention was diverted by some trivial matter. *Schofield v. Chicago, etc., R. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224. "Nor is it an excuse that the usual or statutory signals of approaching trains were not given." *Shearman & Redfield on Law of Negligence*, vol. 2, § 476. And the same authors lay it down that:

"A traveler, driving in a covered carriage, is not thereby excused from looking and listening for trains. It is negligence to approach a crossing without thinking of it, driving fast, with the

Southern Ry Co. v. Carroll

carriage top up. Instead of being excused from the duty of looking, under such circumstances a traveler is rather bound to the use of greater vigilance because of the obstructions with which he has surrounded himself."

In *Railroad Company v. Houston*, 95 U. S. 697, 24 L. Ed. 542, it is held that:

"The neglect of the engineer of a locomotive of a railroad train to sound its whistle or to ring its bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precaution for his safety. Before attempting to cross the railroad track, he is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, in using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses, in such a position, to take risks, he must suffer the consequences."

In the opinion of the court in this case the learned judge Mr. Justice Field says:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

And the same principle is declared in *Schofield v. Chicago, Milwaukee & St. Paul Railway Company*, above cited. It seems needless, however, to quote authorities in support of a principle which has been so frequently declared, and so generally accepted as the law; that is, that, although the defendant was negligent, yet if the plaintiff, under the circumstances, by exercising ordinary and reasonable care, could have prevented the accident, the failure to use such care is such contributory negligence as to prevent the plaintiff's recovery. In other words, that the negligence of the plaintiff was the proximate cause of the injury, and but for it the accident would not have occurred.

Now, let us apply these principles to the facts in the present case. There being no evidence to the contrary, we have a right to assume that the plaintiff was in the full possession of his faculties of seeing and hearing. He says that he knew that the railroad was there about the corporate limits of the town; that the

Southern Ry. Co. v. Carroll

road he was traveling crossed it; and yet with this knowledge, on a dark and cloudy night, when the wind was blowing hard, seated in his vehicle with the curtains down, with his luncheon of sardines and crackers spread upon the seat beside him, he drove heedlessly along in a trot, never stopping, listening, nor even looking, until he was upon the railroad crossing, immediately in front of a moving train. The evidence was uncontradicted, and came from the plaintiff's own witnesses, that those who were listening heard the train coming when half a mile away, and also that the headlight was displayed. It was further in evidence that the situation was such that a train approaching the crossing could be easily seen and heard at a safe distance. Under such conditions, for plaintiff to drive upon the railroad, without taking any precautions whatever, showed a wanton disregard, not only of his own safety, but of the safety of those on board the train which struck him, whose lives he jeopardized by his reckless conduct. He was thus guilty of willful and inexcusable negligence, and even under the statutes of South Carolina is not entitled to recover.

In *Grand Trunk Railway Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, the Supreme Court holds the law to be that:

"When a given statement of facts is such that reasonable men may differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court."

Upon the undisputed and admitted facts in the case now under consideration, in our opinion there can be but one reasonable conclusion, and that is that the injury to plaintiff and his property was due to his own culpable negligence, and but for it he would not have suffered. We hold, therefore, as a matter of law, that the defendant was entitled to the instruction requested, and that it was the duty of the Circuit Court, upon the uncontroverted facts in the case, to charge the jury that the plaintiff was not entitled to recover, and to direct a verdict for the defendant. The judgment of the Circuit Court is reversed, and the case remanded, to the end that judgment may be rendered for the defendant.

Reversed.

GERMAN INS. CO. OF FREEPORT *v.* CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, July 12, 1905.)

[104 N. W. Rep. 361.]

Railroads—Fires—Evidence—Experts.*—In an action against a railroad for fire alleged to have been negligently set out, a question asked of an expert, if there was any way in which fire coming from the fire box could get above the netting in the front end of the engine without going through the netting, referring to the only engine which could have set out the fire, was competent, though calling for a conclusion.

Same.*—In an action against a railroad for fire alleged to have been negligently set out, evidence of qualified witness describing the character of the engines which might have set the fire as belonging to a certain class, and that the quality and equipment of such engines with regard to safety and the setting out of fire were, as a class, the best engines defendant company had, and that the features of a locomotive to be considered in connection with the setting out of fire were the nettings, diaphragm, and plates, was relevant and material.

Same.*—Evidence that an engine could not be operated without small cinders escaping from the smokestack was admissible.

Same—Instructions—Issues—Presentation.—Where the exact points for the decision of the jury were clearly stated in other parts of the charge, it was not prejudicial error for the court, in stating the issues to the jury, to practically copy the pleadings instead of making a short and succinct statement of the issues.

Same—Withdrawn Issues—Submission.—Where an issue was withdrawn during the course of the trial, it was proper for the court not to submit it to the jury.

Same—Burden of Proof.—Where the court in other instructions charged just what plaintiff was required to show in order to make out a case, plaintiff was not prejudiced by an instruction that the burden of proof was on it to establish all the material allegations of the petition.

Same—Negligence.—Where, in an action against a railroad for fire alleged to have been negligently set out, the court charged that proof that the fire was set out by one of defendant's engines raised a presumption that defendant was guilty of negligence, and, in order to avoid liability, the burden was on defendant to overcome such presumption by negating every fact which would justify a finding of negligence, plaintiff was not prejudiced by an instruction that, even though defendant's engine set out the fire, there could be no recovery unless the jury further found that the sparks escaped through some negligence of defendant either in failing to keep the locomotive "in good repair" or otherwise.

Same—Definition.†—An instruction defining negligence as the failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances, was not objectionable as eliminating acts of commission.

Same—Appliances.—Where the jury was instructed that defendant

*For authorities in this series on the admissibility of expert and opinion evidence, see foot-note appended to *Schutz v. Union Ry. Co. of New York City* (N. Y.), 15 R. R. R. 777, 38 Am. & Eng. R. Cas., N. S., 777.

†For the definitions of negligence in this series, see foot-note appended to *Southern Ry. Co. v. Horine* (Ga.), 15 R. R. R. 427, 38 Am. & Eng. R. Cas., N. S., 427.

German Ins. Co. v. Chicago, etc., Ry. Co

railroad company must have had the best appliances for preventing the setting out of fires, and that its engines must have been properly handled, another instruction requiring the use of "appropriate appliances" was not objectionable, as such term applied to the best appliances previously referred to.

Same—Repair.—In an action against a railroad company for the setting out of fire, an instruction that, if the fire was started by sparks emitted from one of defendant's engines, defendant would be liable unless at the time it had used on such engine the best appliances for preventing the setting out of fire, and such engine was properly handled, was not objectionable as eliminating defendant's duty to keep the engine in repair.

Appeal from District Court, Carroll County; F. M. Powers, Judge.

Action to recover damages for the destruction by fire of a dwelling house and contents upon which plaintiff had a fire insurance policy in the sum of \$1,000, which indemnity it paid to the original owner of the property destroyed. Liability on the part of the company is predicated upon its setting out the fire. Defendant denied that it was responsible for the fire, and denied all negligence on its part. It also pleaded a settlement with the owner of the property, but as it withdrew this defense during the course of the trial the case was submitted upon the other issues tendered. There was a trial to a jury, resulting in a verdict and judgment for the defendant, and plaintiff appeals. Affirmed.

J. A. Crain and Lee & Robb, for appellant.

James C. Davis, A. A. McLaughlin, and M. W. Beach, for appellee.

DEEMER, J. Something like 18 errors are assigned as a reason for the reversal of the judgment. Not all are argued, and we shall only consider those which seem to be important or controlling. Most of these center around the instructions given and refused, although there are two or three rulings on evidence which are challenged. These latter relate to the testimony of experts as to the construction and operation of engines.

Claim is made that the defendant, in the negligent operation and construction of its engines, set fire to an elevator in the town of Glidden, which was communicated by this elevator to the insured dwelling house of one Nichols, totally destroying the same with its contents. Defendant denied all negligence, and pleaded that its engines were properly and carefully managed, and were supplied with the best known and most approved appliances for preventing the escape of fire and sparks, which were in good repair, and carefully managed. In making out its case, a witness who showed proper qualifications was asked if there was any way in which sparks or fire coming from the fire box could get above the netting at the front end of the engine without going through the netting. As this testimony had reference to the only engines which could have set out the fire, it was

German Ins. Co. v. Chicago, etc., Ry. Co

manifestly competent and material. True, it was perhaps in the nature of a conclusion, but it was such a one as courts universally permit. *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257, and other like cases. Other qualified witnesses described the character of the engines which might have set out the fire as belonging to what is known as class "R." They were then asked as to the quality and equipment of such engines with regard to safety and the setting out of fires, and answered that in this respect the draft, netting, and appliances were constructed the same as on other engines on the defendant's system, and that they were, as a class, the best engines the company had. They were also asked what features of a locomotive were to be considered in connection with the setting out or the prevention of fires. To this the responses were: netting, diaphragm, plates, netting in front end or smoke box of the engine. Other witnesses were asked as to whether an engine could be operated without small cinders escaping from the smokestack. They answered "No." Manifestly these questions and answers were each and all competent, material and relevant. Most of the testimony was from experts regarding the character and construction of the engines, and, although some of the questions called for answers in the nature of conclusions, they were not objectionable on that account.

2. Instead of condensing the pleadings and giving a short and succinct statement of the issues, the trial court practically copied them in its instructions. This practice is not to be commended, but there was nothing in this case which would in any way confuse or confound the jury. Moreover, the exact points for decision by the jury were clearly stated in other parts of the charge, and no prejudice resulted. *City v. Moore*, 109 Iowa, 476, 80 N. W. 527; *Welch v. Ins. Co.*, 117 Iowa, 394, 90 N. W. 828; *Schaefer v. Ins. Co. (Iowa)* 100 N. W. 857.

3. Error is predicated upon the court's failure to submit the issue which was withdrawn by the defendant. No discussion of such a question seems necessary. It would have been error to have submitted it after its withdrawal. *West v. Averill*, 109 Iowa, 488, 80 N. W. 555.

4. The court instructed that the burden of proof was upon the plaintiff to establish all the material allegations of its petition. If this were all, doubtless the case should be reversed, for a plaintiff is never required to prove more than is necessary to entitle him to recover; and a jury, under such an instruction would have difficulty in separating the material from the immaterial matters. But in other instructions the jury was told just what plaintiff was required to show in order to make out a case. After reading the instructions as a whole, the jury could not have been left in any doubt as to what were the material allegations. Plaintiff's petition was in two counts, and it is contended that it might recover if it established either. This is fundamentally correct; but in this case defendant's liability was predicated on a

German Ina. Co. v. Chicago, etc., Ry. Co

single theory, and this was fairly submitted to the jury. The trial court instructed that if the jury found that the fire was set out by one of defendant's engines, which finally destroyed the insured property, then the presumption arose that defendant was guilty of negligence, and, in order to avoid liability, the burden was on defendant to overcome this presumption by negating every fact which would justify a finding of negligence on its part. And in another instruction this same thought was practically repeated. The burden of overcoming this presumption of negligence was thus cast upon defendant, and the jury was clearly instructed that, unless defendant overcame this presumption, and met the burden, it was liable; and, if liable, that the measure of its responsibility was fixed at the amount plaintiff paid the insured Nichols, with 6 per cent. interest from the time of payment. This eliminated all collateral matters, and introduced nothing that plaintiff was not required to prove in order to recover on either count of its petition.

5. After instructing as above with reference to presumptions, the trial court said in another instruction that, even though defendant's engines set out the fire, yet there could be no recovery unless the jury further found that the sparks escaped or were thrown from the locomotive through some negligence of the defendant either in failing to keep the locomotive in good repair, etc. Taken in connection with the other instructions, there was no error here. Defendant's liability is bottomed on negligence. True, presumptions arose aiding plaintiff's case, or shifting the burden to the defendant, but, after all, negligence must be shown by presumption or otherwise before there is any liability. One instruction related to the ground of ultimate liability, and the other to presumptions and the burden of proof, and there is no conflict between them, when considered together, as all instructions should be. *Greenfield v. R. R. Co.*, 83 Iowa, 270, 79 N. W. 95; *Hemmi v. R. R. Co.*, 102 Iowa, 25, 70 N. W. 746; *Perpetual Co. v. Guarantee Co.*, 118 Iowa, 729, 92 N. W. 686; *Coine v. R. R. Co.*, 123 Iowa, 458, 99 N. W. 134.

6. In defining negligence the court said: "Negligence is a failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances." It is said that this does not cover acts of commission as well as acts of omission, and that in this respect it is faulty and misleading. But we think it covers both. Failure to exercise care and diligence that an ordinarily prudent person would involves either or both. *Shultz v. Griffith*, 103 Iowa, 150, 72 N. W. 445, 40 L. R. A. 117, is not in point.

7. Our fire statute does not make a railway company absolutely liable for fires set out by it. Ordinary and reasonable care on the part of the company is all that is required. There is no unvarying standard of ordinary care. Everything depends upon the circumstances and surroundings of the case. This thought was submitted to the jury under proper instructions. It is gen-

German Ins. Co. v. Chicago, etc., Ry. Co

erally held that ordinary care on the part of a railway company demands the use of the best known and most appropriate appliances for preventing the escape of fire, and the jury in the present case was instructed that defendant must have had the best appliances for preventing the setting out of fires, and that its engines were properly handled. In another instruction the trial court used the words "appropriate appliances." This term had reference to the kind of appliance which the jury had theretofore been told the defendant was required to keep. None other would be appropriate in view of the former instruction, and there was no error here.

8. Instruction 7 given by the court read as follows: "If you find by a preponderance of the evidence that the fire was started by sparks emitted and thrown from one of defendant's engines while being operated on defendant's railroad, the defendant will be liable, unless you further find that at that time it had in use on said engine the best appliances for the preventing of the setting out of fires, and that the said engine was at the time properly handled." This is criticised because it omits defendant's duty to keep its engines in repair. This instruction does not attempt to cover the whole case, and, so far as it went, was correct. Moreover, it will be noticed that the instruction says that defendant at the time the engine set out the fire must have "had in use on said engine the best appliances for the preventing of the setting out of fires." If it did not at that very time have them on that particular engine, then defendant was, according to the instruction, negligent. This necessarily involves the thought that they were then in repair, otherwise they would not be in use. Moreover, in other instructions this point, as well as the condition of the right of way, etc., was expressly covered, and the jury could not have been misled. Other instructions are complained of as being contradictory and misleading. Taking them as a whole, we find no such conflict as counsel think they see. When construed together, as they should be, we think they fairly presented the issues to the jury. Reading some of them alone and apart from others, we might find error, but, taken as a whole, they fully and fairly presented the exact matters for decision. *Faust v. Hosford*, 119 Iowa, 97, 93 N. W. 58; *State v. Urie*, 101 Iowa, 411, 70 N. W. 603; *Martin v. Murphy*, 85 Iowa, 669, 52 N. W. 662. Appellant seems to confuse the degree of care required of a railway with reference to the setting out of fires with the evidence necessary to establish it. Ordinary and reasonable care is all that is required. But as its engines contain fire, which is always a dangerous element, it must use the best known and most approved appliances for confining it. In other words, the care must be proportioned to the danger. The eleventh instruction complained of by appellant holds defendant to the exercise of ordinary and reasonable care, and the seventh required the equipment of the engine with the "best appliances," and the eighth with "appropriate appliances." We find no prejudicial error in the instructions as given.

Montgomery St. Ry. v. Rice

9. As to the instructions asked by the plaintiff and refused, we find that such as embodied correct propositions of law were in fact given, although not perhaps in the exact language of the request. The only doubtful question in the case is the instruction to the effect that the burden was upon the plaintiff to establish the material allegations of its petition. There are no express allegations of negligence in the petition. All that is charged is the setting out of the fire by an engine during the prevalence of a high windstorm, and while structures along the right of way were in a dry and inflammable state. In other instructions the jury were clearly and explicitly directed that, if the fire was set out by one of defendant's engines, the burden of proof was upon the defendant to overcome the presumption of negligence arising therefrom. All that the instruction complained of did was to require proof on the part of the plaintiff that the engine did set out the fire. This, of course, was correct. There was, as we think, no prejudicial error in the instruction given or in the refusal to give those asked. *Coine v. R. R. Co.*, 123 Iowa, 458, 99 N. W. 134; *Perpetual Co. v. Guarantee Co.*, *supra*.

10. Lastly, it is argued that the verdict is without support in the evidence. The case was peculiarly for a jury, and with its finding we are not disposed to interfere. It was for the jury to say whether or not defendant's engine set out the fire, and, if it did, whether or not defendant had met the *prima facie* case of negligence made out against it. There was a conflict in the evidence on these propositions, and in such cases we do not, in the absence of some showing of passing or prejudice, interfere. There is no such showing here.

No prejudicial error appears, and the judgment must be and it is affirmed.

MONTGOMERY ST. RY. v. RICE.

(Supreme Court of Alabama, Feb. 9, 1905.)

[38 So. Rep. 857.]

Collision between Street Car and Team—Wantonness or Willfulness—Question for Jury.—In an action against a street railroad for injuries to a mule, caused by a collision with a car, whether the railroad was guilty of a wanton or willful wrong held, under the evidence, a question for the jury.

Same—Right of Motorman to Assume That Traveler Had Exercised Due Care—Instruction.*—In an action against a street railroad for injuring a mule, a charge that the motorman had the right to assume

*As to the right of those in charge of cars or trains to assume that a person seen on or near tracks will avoid danger, see foot-note appended to *Savage v. Southern Ry. Co.* (Va.), 15 R. R. R. 151, 38 Am. & Eng. R. Cas., N. S., 151; *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575; foot-note appended to *Helm v. Missouri Pac. Ry. Co.* (Mo.), 15 R. R. R. 324, 38 Am. & Eng. R. Cas., N. S., 324; *Louisville & N. R. Co. v. Lewis* (Ala.), 15 R. R. R. 440, 38 Am. & Eng. R. Cas., N. S., 440.

Montgomery St. Ry. v. Rice

that travelers would look and listen for approaching cars before attempting to cross the track, and the jury might consider that fact in determining whether or not the motorman was guilty of a willful wrong, singled out and gave undue emphasis to a particular fact, and was properly refused.

Same—Willfulness—Speed.—The fact that a street car which collided with and injured a mule was not being run faster than five or six miles an hour does not show, as a matter of law, that the motorman was not guilty of a willful or wanton wrong in striking the mule.

Same—Same—Same—Instructions.—In an action against a street railroad for injuring a mule, a charge that defendant was not guilty of a willful or wanton wrong if the car was being run at the rate of five or six miles an hour, was properly refused, because it did not limit the question of speed to the time of the injury.

Evidence—Instructions.—A charge calling on the trial court to declare that there is no evidence of a particular fact is properly refused.

Willfulness or Wantonness—Definitions.†—In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Gus Rice against the Montgomery Street Railway. From a judgment for plaintiff, defendant appeals. Reversed.

This action was tried on the third count of the complaint, charging the defendant with willfully or wantonly injuring a mule, the property of plaintiff, to which count the defendant interposed the plea of not guilty. There was a verdict for the plaintiff. The evidence showed that defendant was engaged in the business of operating an electric street railway in the city of Montgomery; that one of defendant's lines ran along Chandler street, and that the track was straight for several hundred yards on either side of the intersection of Chandler and Proctor streets; that plaintiff's mule, hitched with another mule, was being driven in a walk along Proctor street, and was struck at the intersection of Chandler street and Proctor street by one of defendant's cars, and badly injured. The evidence for the plaintiff showed that the wagon to which the mule was hitched was loaded with sand; that no view of Chandler street could be had until the car track was reached on account of intervening buildings; that the mule was struck as it got upon the track, and simultaneously with the driver's first sight of the car. The plaintiff introduced witnesses who testified that the car was going "very fast," "as fast as it could go," "about fifteen miles an hour." The defendant's witnesses testified that the car was going six or seven miles an hour. There was conflict in the testimony as to whether or not the mo-

†For the definitions in this series of willfulness, wantonness, recklessness, and gross negligence, see foot-notes appended to *Rideout v. Winnebago Traction Co.* (Wis.), 15 R. R. R. 416, 38 Am. & Eng. R. Cas., N. S., 416.

Montgomery St. Ry. v. Rice

torman rang the bell on approaching the crossing. The motorman testified to applying brakes as soon as he saw the peril. The defendant asked and the court refused the following written charges: "(1) The court charges the jury that if they believe the evidence in this case they will find a verdict for the defendant. (2) The court charges the jury that if they believe the evidence in this case, they should not find a verdict under the third count of this complaint. (3) The court charges the jury that there is no evidence in this case of any willful or wanton conduct on the part of the defendant, or its agents or servants or employees in charge of the car which collided with plaintiff's mule. (4) The motorman had the right to assume, on approaching Proctor street, that travelers on foot or in vehicles would look and listen for approaching cars before attempting to cross the track, and this fact you may look to in determining whether or not the motorman was guilty of willful or wanton wrong. (5) The court charges the jury that if you believe from the evidence that the car was not being run faster than five or six miles an hour, and that after the motorman discovered the peril of the mule he put on the brakes, and tried to stop the car, but was unable to do so before the injury happened, then there can be no recovery in this case. (6) If you believe from the evidence that the car was being run at the rate of five or six miles an hour, then this would not warrant a verdict against the defendant for willful or wanton wrong. (7) The court charges the jury that before a party can be said to be guilty of willful or wanton conduct it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act, or omitted some known duty which produced the injury." The defendant severally excepted to the refusal by the court of the foregoing charges, and the action of the court in this respect is assigned as error.

Steiner, Crum & Weil, for appellant.

Hill, Hill & Whiting, for appellee.

ANDERSON, J. The trial court charged out all of the counts of the complaint except No. 3, which charges a willful or wanton act. Under the evidence, although there was a conflict as to the rate of speed the car was going and as to the motorman's knowledge of the surroundings, the trial court properly left it to the jury to determine whether or not defendant was guilty of a wanton or willful wrong. *M. & C. R. R. v. Martin*, 117 Ala. 367, 23 South. 231; *L. & N. R. Co. v. Webb*, 97 Ala. 314, 12 South. 374.

Charge 4 was properly refused. It singles out a fact upon which it is hypothesized, and seeks to direct special attention to the evidence tending to show that phase of the defense, and give

Mattson v. Minnesota & N. W. R. Co

it undue prominence. We have heretofore observed more than once that charges of this character, assuming that the jury may look to this fact or may consider that fact, or are unauthorized to infer certain formulative conclusions from the evidence, and especially from specific parts of it, are bad. *E. T. V. & G. R. v. Thompson*, 94 Ala. 636, 10 South. 280; *Snider v. Burkes*, 84 Ala. 53, 4 South. 225; *Hawes v. State*, 88 Ala. 37, 7 South. 302; *Salm v. State*, 89 Ala. 56, 8 South. 66.

Charges 5 and 6 are bad, and were properly overruled. We cannot, as a matter of law, say that the defendant was not guilty, if the car was not going faster than five, six, or seven miles an hour at such a crossing, as is described by the evidence. It was a question for the jury. Besides, the charges do not attempt to fix the speed of the car at the time of the injury. The car may have been running at the rate of five, six, or seven miles an hour during the day, yet may have been running much faster when the injury was inflicted.

The eighth charge has often received the condemnation of this court. It is argumentative, and also calls upon the trial court to declare to the jury that there is no evidence of a particular fact. *Jefferson v. State*, 110 Ala. 89, 20 South. 434.

Charge 7 asserts the law, and for its refusal the judgment of the court must be reversed. *L. & N. R. Co. v. Mitchell*, 134 Ala. 261, 32 South. 735; *M. & C. R. R. v. Martin*, supra; *L. & N. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35.

Reversed and remanded.

MCCLELLAN, C. J., and TYSON and SIMPSON, JJ., concur.

MATTSON *v.* MINNESOTA & N. W. R. Co.

(Supreme Court of Minnesota, July 21, 1905.)

[104 N. W. Rep. 443.]

Negligence—Care as to Explosives.*—The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost care must be exercised, respecting the care and custody of such instrumentalities, to guard against injury to others.

*See *Means v. Southern California Ry. Co. (Cal.)*, 13 R. R. R. 411, 36 Am. & Eng. R. Cas., N. S., 411 (care required to prevent injuries to licensee, on depot premises, from explosion of sulphuric acid tank; and railroad not liable, on account of mere passive negligence, where such injuries are sustained); foot-notes appended to *Ft. Worth & D. C. Ry. Co. v. Beauchamp (Tex.)*, 3 R. R. R. 52, 26 Am. & Eng. R. Cas., N. S., 52 (in this case it was held that where a railroad company, by failing to use ordinary care, allows a car of explosives to be unnecessarily or unreasonably delayed at a station, or fails to use ordinary care in keeping or caring for such car, it creates a nuisance rendering the company liable for damages resulting to adjacent property from an explosion thereof).

Mattson v. Minnesota & N. W. R. Co

Same—Children.†—The degree of care must be commensurate with the dangerous nature of the article, and is greater and more exacting as respects young children.

Same—Evidence.—Defendant left exposed and unguarded on its premises a large quantity of dynamite, which was found by plaintiff's children, an explosion of which by them resulted in the death of one and the permanent injury of the other. It is held that the evidence is sufficient to justify the jury in finding (1) that the dynamite was obtained from the premises of defendant, (2) that defendant negligently permitted it to remain thereon exposed and unguarded, and (3) that the children were not guilty of contributory negligence.

Same—Imputed Negligence.‡—In an action brought by a child non sui juris for injuries to his person caused by the negligence of defendant, the contributory negligence of his parent or guardian will not be imputed to him. *Fitzgerald v. Ry. Co.*, 13 N. W. 168, 29 Minn. 336, 43 Am. Rep. 212, overruled.

Same—Negligence of Parent.‡—The negligence of the parent will bar an action by him for loss of services, but not an action by the infant.

(Syllabus by the Court.)

Appeal from District Court, Carlton County; J. D. Ensign, Judge.

Action by Charles Mattson against the Minnesota & North Wisconsin Railroad Company. Verdict for plaintiff. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

Davis & Hollister, for appellant.

John Jenswold, Jr., for respondent.

BROWN, J. This action was brought under the provisions of Gen. St. 1894, § 5164, to recover for injuries to plaintiff's minor son, caused, as alleged in the complaint, by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appealed from an order denying his alternative motion for judgment notwithstanding the verdict or for a new trial.

It appears without dispute that plaintiff's two sons—Hjalmar, for whose benefit this action is prosecuted, and a younger brother—both under the age of nine years, obtained from some source a stick of dynamite, which they exploded, instantly killing the younger of the two, and permanently maiming and injuring Hjalmar. Two principal questions of fact were presented for the

†For the authorities in this series on the care due children on railroad tracks or premises, see foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; foot-note appended to *Nashville, etc., Ry. Co. v. Harris* (Ala.), 14 R. R. R. 562, 37 Am. & Eng. R. Cas., N. S., 562; foot-notes appended to *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to maintaining objects attractive and dangerous to children, see foot-note appended to *Kansas City, etc., R. Co. v. Matson* (Kan.), 12 R. R. R. 675, 35 Am. & Eng. R. Cas., N. S., 675.

‡See foot-notes appended to *Richmond, F. & P. R. Co. v. Martin's Adm'r* (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435.

Mattson v. Minnesota & N. W. R. Co

consideration of the jury, viz.: (1) Whether the dynamite resulting in the injury complained of was obtained from the premises of defendant; and (2) if so, whether defendant was guilty of negligence in permitting it to remain on or about its premises unguarded and unprotected. It was claimed by plaintiff that the dynamite was obtained from defendant's premises, and that defendant was guilty of actionable negligence in permitting it to remain in an exposed place thereon. This was controverted by defendant, and it is urged in this court that the evidence is wholly insufficient to justify the verdict of the jury upon either question. The evidence tends to show that, some time prior to the date of the occurrence complained of, defendant was engaged in constructing a roadbed in the vicinity of the farm owned and occupied by plaintiff and his family, and that in and about this work it used dynamite in removing stumps of trees and blasting rock. It had finished its work in this particular, and the employees engaged therein had gone elsewhere; but all the dynamite belonging to defendant, which had been taken to this place for use, was removed at the time the work was completed, at least the evidence is sufficient to justify the jury in so finding. The evidence shows that one box of dynamite was deposited under a pile of ties near the railroad track, and another was discovered, by plaintiff's boys and a neighbor's boy of about their age, under an old mattress, which had evidently been used by defendant's employees during the time they were engaged in the work in that locality. The explosion, which resulted in the death of one of the boys and the injury of the other, occurred not far from the railroad right of way, and near at hand was found on the day following a pile of about 16 sticks of dynamite laid up against the stump of a tree. Just how this came there the evidence does not disclose. It was not upon defendant's premises, but about 30 feet therefrom. Considerable blasting was done by defendant's employees, which was naturally attractive to the boys of the neighborhood, and they were to some extent loitering about the railroad right of way while the work was in progress. They had been warned away by the railroad employees, and plaintiff, their father, had been told to keep them away from the railroad work. On the day prior to the accident the boys discovered the box of dynamite under the mattress, and called the attention of one Nester, who was in the employ of defendant, to the fact. Nester took the box, opened it in the presence of the boys, and, upon discovering that it contained dynamite, stated that he would take it down by the railroad track, a short distance away, and remove it when he quit work at night. The boys asked him for some of the dynamite, but he refused, saying it was a dangerous article to handle and that they must let it alone. They followed him to the railroad track and saw him place it under the ties, where it is claimed the other box was stored, and he must have known of their presence and that they knew where he placed it. The ties were piled along the side and

Mattson v. Minnesota & N. W. R. Co

at right angles with the track, projecting over the embankment, leaving a space underneath the outer ends and the receding bank, in which the dynamite was placed. The boys lingered at the pile of ties until after Nester had returned to his work, when they went to the box, removed the cover, it not being nailed down, and took out a stick of the dynamite and carried it home with them. On their arrival home, the father discovered the dynamite, took it from them, and concealed it in his barn. The day following the boys obtained dynamite from some source, as already stated, and its explosion resulted disastrously to them.

We have considered the evidence with care, and are satisfied that the jury was fully justified in finding that the boys obtained the dynamite from the premises of the railway company; at least, the evidence is not so clearly or conclusively the other way as to justify the court in disagreeing with the jury. While there was evidence that dynamite had previously been used, not only by the railway company, but by plaintiff and other farmers in the vicinity, as an agency in removing stumps in clearing land, the fair inference from all the facts shown, which the jury had the right to draw, points to the fact that the dynamite which did the damage complained of belonged to defendant. Plaintiff testified that he had no dynamite at his home at this time. It appeared on the trial, however, that 60 or 70 sticks were found in one of his buildings under a barrel the day following the accident; but how this came there was not made clear by the evidence, and it was for the jury to say whether the boys took from that source, conceding that it was there on the day of the accident, or from defendant's supply at the pile of ties. The evidence is conclusive that they knew of the location of the company's dynamite (they were present when Nester placed the box under the tie pile), but it does not appear that they knew of that in the building owned by plaintiff. Plaintiff was not at home on the day in question, and if the boys were looking for dynamite for the purpose of pleasure and amusement, and knew that it was within their reach at home, they naturally would not have been searching defendant's premises for it. Upon the whole record, therefore, we conclude that the verdict to the effect that the dynamite was taken from the premises of defendant is sustained. It remains to consider whether the evidence makes a case of actionable negligence against defendant respecting the care and custody of its dynamite, and we pass to that question without further discussion of the evidence upon this feature of the case.

Plaintiff relies for recovery upon the doctrine of the "turntable cases," while it is strenuously contended by defendant's counsel that the facts do not bring the case within that principle of law, that it conclusively appears that defendant took reasonable care of its dynamite, and that, conceding for the purposes of argument that the dynamite resulting in the injury to the boys was taken from its premises, they were trespassers thereon, and no recovery can be had in this action. The rule governing cases of this kind,

Mattson v. Minnesota & N. W. R. Co

stated in substance, is that one who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom, even though a trespasser. The rule is intended for the protection of children of tender years, who from immaturity are incapable of exercising a proper degree of care for their own protection. It was first applied in this state in the case of *Keffe v. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393, where it was said that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to it for purposes of play, is bound to exercise reasonable care for the protection of such children. That case has been followed, and the principle therein laid down applied, in several subsequent cases in this court, and by the courts of last resort in other states; and though in *Twist v. Ry. Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626, it was said that the rule should not be extended, it has been steadily adhered to in substance in all cases where the facts made it applicable.

It is urged by defendant that the doctrine does not apply to the case at bar. In this we cannot concur. The dangerous instrumentality here involved (dynamite) is an extremely hazardous article in the hands of mature persons, and a hundredfold more so in the hands of young children. The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article (*Keasbey on Electric Wires* [2d Ed.] 269, 270), and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child. *Railway Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745. What would constitute reasonable care with respect to adults might be gross negligence as applied to a young child. 7 Am. & Eng. Ency. Law (2d Ed.) 441, and cases cited. The case at bar, within these rules, is even stronger than the so-called "turntable cases." There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom the greater the attraction. As compared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a

Mattson v. Minnesota & N. W. R. Co

turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of defendant. It failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves.

An examination of the books discloses cases somewhat similar to that at bar. In *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, it appeared that defendant kept on his premises, over which the injured person, a boy of tender years, was in the habit of passing, in an exposed place, certain dangerous explosives. The boy discovered the same, took one of them, and exploded it, with serious injury to his person. An action for injuries to the boy, based on the ground that the defendant was guilty of negligence in leaving the explosives upon his premises in an unguarded and unconcealed place, was sustained. In the course of the opinion in that case Judge Cooley made use of language so pertinent to the facts of this case that we quote it. He said: "The moving about of the children upon the land, where they were at liberty to go, while they were not actually employed, was as much an incident to their being there as is the loitering or playing by children outside the traveled part of the highway as they go upon it to school or upon errands. Children, where ever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. In this cause a shed in which a dangerous explosive was stored was left only partly inclosed, and its structure and location were such as naturally to invite the entrance of children, either for play or for shelter from sun and rain. Children were rightfully near it, there was nothing in its appearance to warn them off, it was not fastened against their entrance, and there was nothing about it to indicate that they would do injury or be injured by going there. The box containing the explosives seems to have had more the appearance of a box discarded as of no value, and with worthless refuse in it, than of a box which it was of the very highest importance should be guarded with sedulous care. It was never firmly fastened, and the only warning upon it was a word written upon a top board, which was not always kept on. A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible. We cannot, under these circumstances, say that the plaintiff's father was chargeable with fault in not suspecting the danger and warning his children away from it, or that the child himself was blameworthy in acting upon his childish instincts and propensities,

Mattson v. Minnesota & N. W. R. Co

which combined with the negligence of defendant's servant to bring the danger upon him." In *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 60 L. R. A. 793, 90 Am. St. Rep. 902, it appeared that defendant placed several sticks of dynamite in a box upon a vacant lot in the vicinity where he was engaged in a public improvement under contract with the municipal authorities, and where boys were in the habit of playing, without securely covering the same, and he was held liable for injuries to plaintiff, a boy of tender years, who found the same and exploded one of the sticks.

In the case of *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, it appeared that the railway company had been operating a coal mine near one of its stations, and was in the habit of depositing the slack upon an open lot between the mine and the station in such quantities that it took fire from the spontaneous combustion and remained in that condition, constantly burning. Plaintiff, a young boy, visited the coal mine in company with another boy, and became frightened by threats of other boys who preceded them to the mine, and in an effort to escape from them fell into the burning slack and was severely injured. The company was held guilty of negligence in not properly guarding the pit of slack, and that, under the circumstances disclosed, the plaintiff was not a trespasser. It appeared that people in general visited the mine at pleasure, including boys of the age of plaintiff. There was nothing particularly attractive about the mine, either to adults or children, and certainly nothing attractive in the burning pit of slack. The court in that case cited and commented favorably upon the leading English case of *Lynch v. Nurdin*, 1 Q. B. 29. In that case it appeared that defendant's servant left the horse and cart he was driving for his master unhitched in the street and unattended, while he entered a house on some business errand. Plaintiff, a boy of seven years, and other children, discovering the horse unhitched, began playing about the cart. Some of the boys got into the cart, while another led the horse down the street. Plaintiff, in attempting to get out of the cart, fell between the wheels; the cart passing over and breaking one of his legs. Defendant, the master, was held liable for the neglect of its servant in leaving the horse in the manner stated, and that his responsibility was not overcome by the fact that the boys were trespassers. That is an extreme case, and has not been followed to its full extent by the courts of this country. It is only referred to as illustrating the strictness of the rule in this class of cases.

In *Euting v. Railway Co. (Wis.)* 92 N. W. 358, 60 L. R. A. 158, 96 Am. St. Rep. 936, it appeared that an employee of defendant placed a torpedo upon the track, and ran his engine over and exploded it, injuring a boy who was standing near. The act was not in the discharge of the fireman's duties, but, on the contrary, outside his employment, being an attempt to assist at a Fourth of July celebration then in progress at the place. The

Mattson v. Minnesota & N. W. R. Co

company was held liable. In *Railway Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, it appeared that the conductor of a freight train, in a spirit of jollity and mirth, and to have some sport with certain lady passengers on his train, with whom he was acquainted, placed a torpedo in front of the caboose at a point on the road where people were in the habit of passing frequently, expecting that when the car passed over it an explosion would occur and frighten them. No explosion occurred, however, and later in the day the torpedo was found by some boys, who exploded it, injuring plaintiff. The company was held liable, and stress was laid in the opinion on the fact that the railway company had not exercised proper care respecting the custody of the torpedo, and the point that the act of the conductor in placing the torpedo on the track was not in the line of his duties was held not well taken. In *Edgington v. Railway Co.* (Iowa) 90 N. W. 95, 57 L. R. A. 561, will be found an elaborate review of all the leading cases on this subject. That was a "turntable case"; but the rules and principles of law applicable to the protection of children from dangerous instrumentalities on the premises of another are carefully reviewed and considered.

The case at bar is wholly unlike *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, a case where it was sought to hold the owners of the premises liable for the death of a boy who was drowned in an artificial pond located thereon. Unlike dynamite, there is nothing intrinsically dangerous about an ordinary pond of water, natural or artificial, and the court there very properly held that the doctrine of the "turntable cases" did not apply. Nor is the case at bar like *Haesley v. Railway Co.*, 46 Minn. 233, 48 N. W. 1023, 24 Am. St. Rep. 220. In that case cars were left by servants of the railway company in one of its yards, and plaintiff and other boys released the brakes, and the cars ran down a grade, resulting in the injury of plaintiff. It was held that the company was not liable, and that it performed its full duty by setting the brakes on the cars, which the evidence disclosed was done. Whether defendant in the case at bar performed its full duty in the matter of caring for the dynamite injuring plaintiff was a question of fact for the jury. The other Minnesota cases cited and relied upon by appellant, where the doctrine of the "turntable cases" has been held not applicable, are clearly distinguishable. It is unnecessary to extend this opinion by making special reference to each.

In view of the authorities cited and the principles laid down by them, we have no difficulty in holding that the doctrine of the "turntable cases" applies to the case at bar, and that defendant is liable. That defendant's employees left exposed upon its premises a large quantity of the dynamite is clear; and whether it was responsible for the act of Nester, in failing to properly guard and conceal the quantity known by him to have been found by the boys, is not of controlling importance. The fact remains that those who were intrusted with its custody, the employees

Mattson v. Minnesota & N. W. R. Co

engaged in the work in which it was used, failed to exercise due care respecting it, with the knowledge that children were in the habit of loitering about the railroad premises; and within the principle of the cases cited defendant is responsible for this neglect.

It is also urged that plaintiff, the injured boy's father, was guilty of contributory negligence; that he knew that his boys had been frequenting the railroad premises, had obtained dynamite therefrom, and wholly neglected to take adequate steps to keep them away, and failed to inform defendant that they had obtained dynamite therefrom; hence that he was guilty of such negligence as will bar recovery in this action, brought for the benefit of the injured boy. It may be conceded that plaintiff was guilty of contributory negligence as contended by defendant; but as his negligence can defeat a recovery only by imputing it to the injured son, as held in *Fitzgerald v. Railway Co.*, 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212, we take this occasion, the question being squarely presented by the facts, to reconsider the rule announced in that case. It was there held that negligence of a parent having the care of an infant non sui juris, which contributes with the negligence of a third person to produce injury to the child, bars recovery by the latter. The decision was by a majority of the court, and was based upon what was regarded sound principle. There has been much discussion of this question by text-writers and judges, and the courts have not agreed thereon. A number of the states have adopted the reasoning of the leading New York case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, and held to the doctrine as announced by this court in the *Fitzgerald Case*; while other states, following the lead of the Supreme Court of Vermont in *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, utterly repudiate the doctrine as unsound in principle and at variance with the general rules of law applicable to the rights of infants. It is said in 4 Current Law, 778, that by weight of modern authority negligence of a parent or custodian is not imputable to a child non sui juris, so as to bar an action brought on its behalf, and the authorities in support of the statement are there cited. Bishop, in his work on Noncontract Law, says that the doctrine of imputed negligence, whereby an infant loses his suit, "not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested." The law, says the writer, never took away a child's property because his father was poor or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But by this doctrine, "after a child has suffered damages, which confessedly are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother,

Mattson v. Minnesota & N. W. R. Co

or mother's maid happens to be one making a contribution." The writer concludes that the "law's established reasons" do not to any extent sustain the doctrine. The rule is criticised and declared obnoxious to sound principles by Beach in his work on Contributory Negligence (3d Ed.) § 127 et seq., and by Judge Jaggard in his work on Torts. 2 Jaggard on Torts, 985. These criticisms are sustained by a vast majority of the courts, state and federal. The authorities will be found cited in the works referred to and in 7 Am. & Eng. Ency. of Law (2d Ed.) 448 et seq. See, also, *Berry v. Railway Co.* (C. C.) 70 Fed. 679, *Battis-hill v. Humphreys* (Mich.) 31 N. W. 894, and *Westbrook v. Ry. Co.* (Miss.) 6 South. 321, 14 Am. St. Rep. 587, where the subject is ably discussed and the authorities reviewed.

We have given the matter very serious consideration, with the result that in our opinion the doctrine of the Fitzgerald case is unsound, at variance with elementary principles of the law respecting the rights of infants, and should be overruled. The right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right, and entitled to the same protection in the courts as is accorded other property held or owned by him. He is entitled to the protection of the law equally with persons who have attained their majority, and to refuse him relief on the ground of his parents' indifference or negligence would be to deny it to him. To impute to him negligence of others is harsh in the extreme, whether the negligence so imputed be that of his parents, their servants, or his guardian. He is a citizen within the meaning of the law of the land, and entitled to such rights and privileges as are appropriate to his class, and to the equal protection of the law. Though the Fitzgerald Case has remained undisturbed many years as the law of this state, the rule there laid down is not a rule of property, no rights will be affected by a departure from it, for no one has a vested right to negligently cause injury to another, and we have no misgiving as to consequences in setting the court right on this important question, and placing it in line with the weight of modern thought. If it had become a rule of property, we would not disturb it; but not being such, and being clearly wrong in principle and contrary to sound policy, it should not be longer adhered to. *Ganser v. Ganser*, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461.

The other assignments of error require no extended mention. The evidence tending to show that defendant permitted black powder and other explosive matters to remain around and about its premises in the vicinity in question was proper upon the question of the degree of care actually exercised by its servants respecting the custody, care, and control of the dynamite. The point made that the court erred in refusing the sixteenth request, to the effect that, if the jury were unable to determine from the evidence whether the boys obtained the dynamite from the premises of the railway company or from plaintiff's premises,

Bridges v. Jackson Elec. Ry., L. & P. Co

plaintiff could not recover, is not well taken. The court fully covered this request in its general charge.

Nor was there any error in the instructions of the court upon the question of damages. It is urged in this connection that under the charge of the court the jury was permitted to award plaintiff damages for the loss of services of his son; but a careful reading of the instructions does not sustain this view. If counsel were apprehensive that the jury might gain that impression from the charge, it was their duty to call the attention of the court to the matter, that the error, if any was made, could be corrected. It is clear that the court did not intend to so charge the jury. The rule of *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. 754, applies. The damages awarded by the jury are quite large, but the same amount was sustained by the Supreme Court of the United States in the case of *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434.

The question of the contributory negligence of the boys was one of fact, and we would not be justified, on the facts disclosed, in overruling the conclusion reached by the jury on that subject.

Order affirmed.

BRIDGES v. JACKSON ELECTRIC RY., LIGHT & POWER CO.

(Supreme Court of Mississippi, July 17, 1905.)

[38 So. Rep. 788.]

Contributory Negligence—Effect of—Duty to Instruct.—Where, in an action for injuries, plaintiff's evidence and all just inferences to be drawn therefrom show that his own negligence contributed to produce the injury, it is the duty of the court, though defendant introduces no proof to support a plea of contributory negligence, to instruct the jury, as a matter of law, that plaintiff cannot recover.

Same—Question of Law.—When the facts are not disputed, and the inferences or conclusion resulting therefrom are indisputable, the question of contributory negligence is one of law for the court.

Injury to Street Railway Passenger—Contact with Trolley Post—Contributory Negligence—Standing on Running Board.*—In an action against a street railway for injuries to a passenger through being struck, while standing on the running board of defendant's car, by a trolley post, evidence held to show contributory negligence on plaintiff's part.

Pleading and Evidence.—A defendant need not introduce testimony to support a plea which is fully sustained by plaintiff's evidence.

Passenger Standing on Running Board—Danger—Evidence.—No proof is required to establish the proposition that it is more dangerous to be on the running board of a street car than to be on the seat, or even on the platform.

*For the authorities in this series on the subject of the contributory negligence of passengers in standing on the running boards of street cars, see foot-note appended to *Wheeler v. South Orange & M. Traction Co.* (N. J.), 15 R. R. R. 52, 38 Am. & Eng. R. Cas., N. S., 52.

Contributory negligence of passengers in extending person beyond car line, see foot-note appended to *Huber v. Cedar Rapids, etc., Ry. Co.* (Iowa), 12 R. R. R. 768, 35 Am. & Eng. R. Cas., N. S., 768, where all preceding authorities in this series are collected or referred to.

Bridges v. Jackson Elec. Ry., L. & P. Co

Injury to Street Car Passenger—Contact with Trolley Post—Standing on Running Board—Assumption of Risk.*—Where a passenger on a street car, inside which there is plenty of room, voluntarily leaves his seat and stands on the car platform, and, while the car is running rapidly, attempts to return to his seat by way of the running board of the car, on a side where he knows there are trolley posts, instead of going down the aisle, he thereby assumes all the risks arising from the position taken by him.

Same—Same—Negligence—Proximity of Post.—In an action against a street railway for injuries to a passenger, while standing on the running board of defendant's car, through being struck by a trolley post at the side of the track, that the pole was slightly nearer the track than two other posts just on each side of it does not tend to prove that the post in question was dangerously near the track.

Same—Same—Gross Negligence—Proximity of Post.—Nor does it show gross negligence on defendant's part, the other posts appearing to have been further from the track than was necessary.

Same—Same—Negligence—Proximity of Post—Presumption.—In the absence of evidence, it would not be presumed that the post, which was 33 inches from the nearest rail of a street car track, was dangerously near or at all too close to the track.

Same—Same—Same—Same—Same.—The mere fact that the accident occurred did not even tend to prove that the post was too near the track.

Same—Same—Contributory Negligence.—The fact that the guard rail or bar which plaintiff knew was ordinarily kept down along the side of the car nearest the posts, as protection against the same, was up, did not relieve him of contributory negligence in exposing himself to an obvious danger.

Same—Same—Negligence—Guard Rails.†—A street railway is not negligent in failing to maintain a guard rail on the side of a car nearest the trolley posts for the protection of passengers where the posts are not dangerously near the track, and the danger therefrom is obvious.

Duty to Protect Passenger.—Carriers are not bound to so restrain the liberty of their passengers that the latter can by no act of their own put themselves in unnecessary danger.

Appeal from Circuit Court, Hinds County; D. M. Miller, Judge.

Action by P. B. Bridges against the Jackson Electric Railway, Light & Power Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Alexander & Alexander and Geo. B. Power, for appellant.

Williamson & Wells, for appellee.

Houston, Special Judge. This was a suit by the appellant (plaintiff below) for the recovery of damages for personal injuries alleged to have been sustained through the negligence of appellee while he was its passenger; said injury being caused by appellant being struck by, or coming in contact with, one of the trolley poles on the side of one of the open cars of appellee on its

†For the authorities in this series on the subject of negligence in allowing passengers to ride in dangerous places, or otherwise expose themselves to danger, see foot-note appended to *Stone v. Lewiston, etc., St. Ry. (Me.)*, 14 R. R. R. 240, 37 Am. & Eng. R. Cas., N. S., 240.

Bridges v. Jackson Elec. Ry., L. & P. Co

street railway in the city of Jackson. Appellee pleaded the general issue and a plea of contributory negligence. At the conclusion of appellant's evidence, the lower court sustained a motion to exclude all of it, gave a peremptory charge, and entered a judgment dismissing the case, from which plaintiff below prosecuted this appeal.

Able counsel for appellant in their brief say that the only question presented for decision is whether the case showed that appellant was guilty of such contributory negligence as to warrant the court in granting the peremptory instruction.

Of course, it is an elementary principle that, in actions for injuries through negligence, the plaintiff cannot recover if his own negligence or want of ordinary care produced, or even contributed as the proximate cause to produce, the injury complained of; and if the facts shown by the whole testimony for the plaintiff, and all just inferences from those facts, make this clear, then, in such a state of evidence, although the defendant introduce no evidence in support of his plea of contributory negligence, it is not only within the power, but it is the duty, of the court to decide upon the legal effect of the evidence, and to instruct the jury, as a matter of law, that the plaintiff cannot maintain his action. When the facts are not disputed, and the inferences or conclusions resulting therefrom are indisputable, the question of contributory negligence is one of law for the court to determine, and not one of fact for the jury. *Railroad Co. v. McGowan*, 62 Miss. 682, 52 Am. Rep. 205; *Railroad Co. v. Alexander*, 62 Miss. 496; *McMurtry v. Railroad Co.*, 67 Miss. 601, 7 South. 401; *Swan v. Ins. Co.*, 52 Miss. 704; *Todd v. Railroad Co.*, 80 Am. Dec. 49.

Now, the evidence in this case establishes, beyond cavil, controversy, or dispute, that, on the night of the accident, plaintiff and his wife took passage and obtained seats on the car at Livingston Park, returning to their home, near the Insane Asylum; that, when the car stopped at Spengler's corner, plaintiff, according to his own evidence, voluntarily left his seat inside the car, just behind his wife, to speak to a man whom he saw on the rear platform, and who he thought was a friend, about a personal matter. When he arrived at the rear platform, although he ascertained that he was mistaken in the identity of the man, and that he was not the one whom he had left his safe seat to see and converse with regarding a purely personal matter, still, instead of returning to his seat, which the defendant company had provided for its passengers, and which remained empty and awaited him, he engages in a nonbusiness conversation with this stranger, so far as this record discloses. As the car was then standing still, and as he discovered that this was not the friend to whom he desired to speak, which was the sole and only reason assigned for his leaving his seat, he should have returned to it by way of the aisle provided for the purpose, and could have safely done so. But not content with failing to keep his seat,

Bridges v. Jackson Elec. Ry., L. & P. Co

where he confesses he would have been perfectly safe, or to return to it while the car was standing, which he could have safely done, even by way of the running board, according to his own testimony, he continued a seemingly idle conversation with this stranger, and waited until the car started and was running rapidly. Then, and not until then, does he begin his journey back to resume his seat; and even at that time, instead of returning to it by way of the inside aisle, specially provided for this specific purpose for him and all passengers, he deliberately, voluntarily, and unnecessarily chooses, without any compulsion, direction, invitation, or knowledge on the part of any employee of appellee company, the more dangerous and extremely hazardous route along the running board on the outside of the car, and on the very side where he admits he knew these trolley posts were, including the one which he was injured by, and although he had at the time heard of somebody being knocked off of the running board by these trolley posts previous to that somewhere. He further admits that he frequently rode on this North State street car, he having lived on that street for many years, and knew of these lines of posts along this west side of the track, and also knew that it was the custom of the defendant company to keep the bars or cross-guards down on the side next to these posts, and had heard that it was done for the very purpose of preventing people from getting on the running boards, and thus protecting them from those posts. When asked if he could not have gone up the aisle in returning to his seat, he finally answered: "I suppose I could. I don't remember now the condition of things"—and admits that other people were passing and going into the car at that very time; that he knew of no compelling interest requiring him to go along this running board, except he must have considered it the shortest way to his seat, or because it was the most convenient way. Plaintiff's witness Waycaster swears that there were plenty of vacant seats, and that he knew of no reason why plaintiff should not have walked back in the aisle and sit down in the same seat he had voluntarily left; and his witness McGee says that there was nothing to prevent him from doing this, and, if he had done so, there would have been no danger in the world, so far as he knew; that he (witness) did not use that running board, because he considered it dangerous; that he thought any prudent man could see that it was a dangerous thing to do; and that he had heard conductors caution people about getting on these boards. In view of all of this evidence adduced by the plaintiff himself, demonstrating his want of the most ordinary care, we are constrained to agree with the appellant in his statement, relative to how he got hurt, to his own witness, Alex Montgomery, who testified that on the night of the injury appellant said, according to witness' recollection, that it was his (appellant's) fault, or something to that effect. His own evidence making it manifest that his own carelessness contributed as the proximate cause to produce his unfortunate injury, and

Bridges v. Jackson Elec. Ry., L. & P. Co

thereby sustained the contributory negligence plea of defendant, there was no other course left for the court than to instruct the jury that this precluded the possibility of plaintiff's recovering damages, under the law. It is a self-evident proposition that it was wholly unnecessary for the defendant below to introduce testimony in support of a plea which plaintiff's own evidence fully sustained. Authorities *supra*.

While this is a case of first impression in Mississippi—this court never having decided the question here presented for determination—the courts of last resort of other jurisdictions have settled the principles here involved. As held by numerous authorities, it is too obvious for proof, and therefore requires none to establish the proposition, that it is manifestly more dangerous to be on the running board of a car than to be on the seat—more dangerous even than to be on the platform of the car. Counsel for appellant concede this, and, with their usual frankness, also concede that there was no absolute necessity for appellant being on the running board at the time he was injured, and that in placing himself on the running board, even for the purpose of passing from one part of the car to another, he assumed the risks of the ordinary perils of that position, and he will be held to have anticipated the dangers probably incident thereto.

Clark, in his *Accident Law* (2d Ed.) *Street Railways*, § 37, "Riding on Running Boards," uses this language: "Although riding on the running board has apparently been attended with rather more danger than riding on the platform or steps, it is nevertheless held that riding in this position is not of itself lack of due care, as a matter of law; and the rule is the same whether the car is a horse car, an electric car, or stage sleigh. * * * Whether or not the car is crowded is perhaps the most important consideration in determining the question of the passenger's due care. Where the car is crowded, and the passenger rides on the running board without objection from those in charge of the car, he is held not to be guilty of lack of due care, as a matter of law, while, if there is plenty of room inside, it has been held that the passenger assumes all the risks arising from the position which he chooses to take, and in any event a passenger riding on the running board assumes the risk of the ordinary perils incident to the position." He cites numerous authorities.

The undisputed evidence in this case is that there "was plenty of room inside," but appellant voluntarily chose to leave his seat, and, not only to take his position on the platform, but waited there until the car was running rapidly; and then, instead of returning by way of the aisle, which would have been perfectly safe, he chooses the more dangerous route, on the side where he knew these posts were, etc. He thereby assumed all the risks arising from the position which he chose to take. In *Thane v. Scranton Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767, the court says: "The distinction sought to be made between an injury from ordinary risks, and from a collision the result of the

Bridges v. Jackson Elec. Ry., L. & P. Co

negligence of the carrier, is not sound. What the passenger took upon himself was the risk of his position from any cause." Beach, in his admirable work on Contributory Negligence (2d Ed.) § 294, makes the question as to whether or not walking along the side steps or running board of an open car from the rear platform to a seat is contributory negligence depend on whether there was any other means of passing from one end of the car to another; that is, whether or not there was an aisle. Indeed, some of the authorities go to the extent of specifically holding (which it is not necessary to hold in this case) not only that it is the absolute duty of a passenger to go on the inside of the car, if there is any room there, but that in the use of cars of steam railroads the rule admits of no exception which does not rest on necessity, and that, if he does not observe this, he takes all of the risks of his location elsewhere. *Bumbear v. Traction Co.*, 198 Pa. 200, 47 Atl. 961, and cases cited.

We do not think that the simple fact that this trolley pole, with which he came in contact was slightly nearer the track than two others just on each side of it proves, or even tends to prove, that said pole was dangerously near the track, or that this shows any gross negligence on the part of defendant. The other posts might be, and seem to have been, further from the track than was necessary. The evidence shows that it was 33 inches, or nearly 3 feet, from the part or point of the post with which appellant came in contact to the center of the rail next to the post, and there is no evidence whatever to show that this was dangerously near or at all too close to the track. And this should not be presumed, assumed, or conjectured in the absence of any evidence from which it can be presumed or assumed or conjectured. The mere fact of the accident having occurred does not even tend to prove it. Indeed, so far as the decisions that we have been able to find throw any light upon this question, this trolley pole is a greater distance from the track than is usual or necessary in street railway construction. In *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, 25 N. E. 387, the intervening space between the outside steps of an open car, where the plaintiff was passing when the accident occurred, and the car which struck him, was only 17 inches; and, although the space between the tracks sometimes varied a few inches more or less, the court held this was not negligence on part of the railway company, and that defendant was not bound so to construct its tracks that it would be impossible for a passenger to be struck by another car when he was standing on the outside of an open car, and said that "the body of the plaintiff must, with reference to the car, have been at a most extraordinary and unusual angle at the time of the accident, in order that it should have occurred at all." It further held that, although the plaintiff was talking to the conductor at the time, it was no negligence on the conductor's part in failing to prevent plaintiff from going on the steps, or in not warning him of any possible danger which might arise therefrom. In the

Bridges v. Jackson Elec. Ry., L. & P. Co

instant case the smallest space was 33 inches, and there is no pretense of proof that the conductor or any agent of appellee knew anything about appellant's walking or intending to walk on the running board, or even as to his being on the platform. *Hesse, Adm'r, v. Meriden Traction Co.*, 75 Conn. 571, 54 Atl. 299, was a case where plaintiff's decedent, who was a passenger on a trolley car, might have stood between the seats, but voluntarily stood on the running board, and had ridden some distance when he was struck by a pole only 4½ inches from same, and leaning towards the track.

Nor do we think that the fact that the guard rail or bar was up, which appellant knew was ordinarily kept down along the side next to the posts, to protect from the posts, was an invitation to him to expose himself to the danger from which the bar, when down, was intended to protect. If he understood it to be such an invitation, he should not have accepted it. He knew the posts were there. He knew, if from nothing else, at least from the customary use of the bar, that they were dangerous to any one on the running board, and, to use his own language, "had heard of somebody being knocked off by posts previous to that somewhere." He was guilty of negligence in exposing himself, without cause and without the procurement of appellee, to an obvious danger, and was none the less guilty of such negligence simply because the servants of appellee did not fence him off from it. In the case of *Indianapolis R. R. v. Rutherford* (Ind.) 92 Am. Dec. 336, the court held that the duty of the carrier does not extend to barricading its cars and imprisoning its passengers so as to prevent them by their recklessness and folly from voluntarily exposing themselves to needless perils or obvious dangers. Such a doctrine would give power to railway officials to so restrain the liberty of their passengers in every respect that they could not by any act of their own put themselves in unnecessary danger, for such a power must necessarily exist if the duty to exercise it exists. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liability. Carriers have not, and ought not to have, any such powers, and hence no liability results. Its passengers are not its slaves. Though passengers, they are nevertheless free men. *Sharkey v. Street Railway Co.*, 84 Md. 163, 34 Atl. 1130, was a case strikingly similar to the instant case, and the court held (1) that the deceased was guilty of such contributory negligence, as a matter of law, as to preclude a recovery; (2) that it was not shown that the position of the poles between the tracks was unusual and dangerous in railway construction; (3) that it was not negligence on the part of the defendant not to have a guard rail on the side of the car next to the poles. To the same effect, see *Clark's Accident Law* (2d Ed.) *Street Railways*, "Riding on Running Boards," § 37. On the case generally, see authorities *supra*, and *Todd v. R. Co.*, 80 Am. Dec. 49; *Clark v. St. Ry.*, 36 N. Y. 135, 93 Am. Dec. 495; *Ashbrook v. Ry. Co.*, 18 Mo. App.

Southern Ry. Co. v. Aldredge & Shelton

290; Schoenfeld v. Ry. Co., 74 Wis. 433, 43 N. W. 162; Coleman v. Ry., 114 N. Y. 612, 21 N. E. 1064; Woodroffe v. Ry. Co., 201 Pa. 521, 51 Atl. 324, 88 Am. St. Rep. 827; Mann v. Traction Co. (Pa.) 34 Atl. 572; Bradley v. Ry. Co., 90 Hun, 419, 35 N. Y. Supp. 918; Dixon v. Ry. Co., 100 N. Y. 171, 3 N. E. 65; Wills v. R. Co., 129 Mass. 351; Moody v. Ry. Co. (Mass.) 65 N. E. 29; Tanner v. Ry. Co., 72 Hun, 465, 25 N. Y. Supp. 242; Martin v. Ry. Co. (Sup.) 38 N. Y. Supp. 220; Downey v. Hendrie, 46 Mich. 498, 9 N. W. 828, 41 Am. Rep. 177; Archer v. R. Co., 87 Mich. 101, 49 N. W. 488; Maguire v. R. Co., 115 Mass. 239.

We deem the second assignment of error also untenable.

Affirmed.

SOUTHERN RY. CO. v. ALDREDGE & SHELTON.

(Supreme Court of Alabama, Jan. 31, 1905.)

[38 So. Rep. 805.]

Carriers—Liability as Warehousemen—Degree of Care.*—The responsibility of a railroad company keeping goods in its depot after the termination of the transit is that of a warehouseman for hire, and it is therefore bound to exercise ordinary diligence.

Same—Same—Presumption of Negligence.—Where a railroad company failed to deliver on demand goods intrusted to it, which it was liable to keep as a warehouseman for hire, or did not account for such failure, prima facie negligence would be imputed to it, and the burden was on it to prove that the loss was occasioned without any want of ordinary care on its part.

*For the authorities in this series on the duties and liabilities of carriers as warehousemen, see Lyman v. Southern Ry. Co. (N. Car.), 9 R. R. R. 271, 32 Am. & Eng. R. Cas., N. S., 271 (loss by fire); Frederick v. Louisville & N. R. Co. (Ala.), 3 R. R. R. 43, 26 Am. & Eng. R. Cas., N. S., 43 (liability as warehousemen where carrier has refused to deliver goods); note, 13 Am. & Eng. R. Cas., N. S., 92; note, 17 Am. & Eng. R. Cas., N. S., 397 (liability as warehousemen); extensive note, 11 Am. & Eng. R. Cas., N. S., 111, et seq. (liability as warehousemen); note, 11 Am. & Eng. R. Cas., N. S., 111, 17 Am. & Eng. R. Cas., N. S., 398, 20 Am. & Eng. R. Cas., N. S., 461 (when liability as warehousemen begins); Cox v. Vermont Cent. R. Co. (Mass.), 9 Am. & Eng. R. Cas., N. S., 591; Brunswick Grocery Co. v. Brunswick & W. R. Co. (Ga.), 13 Am. & Eng. R. Cas., N. S., 85 (independent contractors' negligence causing loss of goods by fire did not render railroad liable as warehousemen); Blackmore v. Missouri Pac. Ry. Co. (Mo.), 21 Am. & Eng. R. Cas., N. S., 361 (liability for baggage); Wiegand v. Central R. Co. of New Jersey (Pa.), 5 Am. & Eng. R. Cas., N. S., 61 (statute limiting liability of carriers was not intended to relieve warehousemen); Berry v. West Virginia & P. R. Co. (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103; Georgia & A. Ry. v. Pound (Ga.), 17 Am. & Eng. R. Cas., N. S., 398 (liability); American Sugar Refining Co. v. McGhee (Ga.), 2 Am. & Eng. R. Cas., N. S., 697 (effect of refusal of consignee to receive goods); Georgia & A. Ry. Co. v. Pound (Ga.), 17 Am. & Eng. R. Cas., N. S., 398 (sufficiency of evidence of custom charging carriers with liability as); Pennsylvania R. Co. v. Liveright (Ind.), 2 Am. & Eng. R. Cas., N. S., 455 (liability for baggage).

Southern Ry. Co. v. Aldredge & Shelton**Carriers as Warehousemen—Negligence—Question for Jury.—**

Where a carrier's agent testified that the depot in which the goods sued for were kept was a safe place, and that it was kept locked at night, and also in the day, whenever defendant's employees were not present, which was all the evidence on that subject, in an action for failure to deliver the goods whether or not there was a want of ordinary care was for the jury.

Negligence—Instruction.—Where, in an action against a carrier for loss of goods stored, there was no evidence that A. received the goods from the carrier's agent, but the evidence was clear that the goods never went out of the possession of defendant's agent until they were lost, a requested instruction that if defendant received the goods from the carrier's agent, and asked him to allow them to remain until he could send back for them, and when he sent back for them they were not there, such facts did not establish defendant's negligence, was properly refused.

Evidence.—Where, in an action against a carrier for loss of goods stored, it appeared that when plaintiffs called for the goods they could not carry them all, and requested defendant's agent to allow those not carried to remain in the warehouse until they could call for them, which was assented to, evidence as to how far plaintiff lived from the depot was inadmissible.

Same.—It was error for the court to refuse to charge that the fact that plaintiff lived 27 miles from the depot should not be considered by them for any purpose.

Carrier as Warehouseman—Loss of Goods—Degree of Proof—Instruction.—In an action against a carrier for loss of goods stored, a requested instruction that, if the jury were not satisfied to a reasonable certainty whether the goods were left with defendant at defendant's risk or at plaintiff's risk, the jury could not find a verdict for plaintiff, was properly refused, as requiring too high a degree of proof.

Same—Burden of Proof—Instructions.—Where, in an action against a carrier for loss of goods stored, the court charged that the burden was on plaintiff to prove to a reasonable certainty that the goods were lost on account of defendant's negligence, and if the evidence as to negligence was so equally balanced that the jury were not convinced to a reasonable certainty that the goods were lost on account of negligence, and if the goods were kept in defendant's depot with reasonable care, plaintiff could not recover, such instructions cured error in refusing to charge that if the jury were reasonably satisfied that the defendant kept the goods in its depot with reasonable care, and that some one stayed in the depot in the day, and kept it locked at night, plaintiff could not recover.

Appeal from Circuit Court, Etowah County; J. A. Bilbro, Judge.

Action by Aldredge & Shelton against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked:

"(2) If the jury believe all the evidence, they cannot find for the plaintiff in the second count of the complaint.

"(3) The burden is on the plaintiff to show that defendant was guilty of gross negligence in keeping the goods, to a reasonable certainty; and, if the evidence is in such a state of confusion and uncertainty as that the jury cannot say that they are

Southern Ry. Co. v. Aldredge & Shelton

satisfied to a reasonable certainty that the goods were lost by the negligence of defendant, then plaintiff is not entitled to recover.

"(4) If Mr. Aldredge received the goods from the agent, and asked the agent to allow them to remain till he could send back for them, and when he sent back for them they were not there, this does not make out a case of negligence against defendant, or entitle plaintiff to recover.

"(5) The mere fact, if it be a fact, that the shoes were there when Aldredge got the one case of shoes, and were not there when he sent for them, several days later, is not of itself sufficient to show that defendant was guilty of negligence which brought about the loss of the shoes.

"(6) The court charges the jury that the uncontradicted evidence in this case shows that plaintiff left the shoes in defendant's depot without a reward, and plaintiff is not entitled to recover unless defendant was guilty of gross negligence in keeping the shoes."

"(8) The court charges the jury that the fact that plaintiff lived 27 miles from Attalla is not to be considered by the jury for any purpose.

"(9) The court charges the jury, if the jury are not satisfied to a reasonable certainty whether the goods were left with defendant at defendant's risk or at plaintiff's risk, the jury cannot find a verdict for plaintiff.

"(10) The court charges the jury, if the jury are reasonably satisfied that defendant kept the goods in his depot with reasonable care, and that some one stayed in the depot in the day, and kept it locked at night, then plaintiff cannot recover."

At the request of the defendant the court gave to the jury the following charges:

"(5) The court charges the jury the burden is on plaintiff to prove to a reasonable certainty that the goods were lost on account of some negligence of defendant. If the evidence as to negligence is so equally balanced as that the jury are not convinced to a reasonable certainty that they were lost on account of the negligence of defendant, then plaintiff cannot recover in this action."

"(11) The court charges the jury, if the jury believe from the evidence that the goods were kept in defendant's depot with reasonable care, the jury must find a verdict for defendant."

Burnett, Hood & Murphree, for appellant.

Geo. D. Moltey and *E. D. Hammer*, for appellee.

SIMPSON, J. This was an action by appellees for the value of two cases of shoes; basing their right to recover on appellant's liability as a common carrier in the first count, and on its liability as a warehouseman for reward in the second count, of the complaint. The judgment was for plaintiffs for \$30.16.

The undisputed facts of the case are that two shipments of

Southern Ry. Co. v. Aldridge & Shelton

shoes were received for plaintiffs at Attalla; that when plaintiffs called for them they could not carry them all, and requested defendant's agent to allow those not carried away then to remain in the warehouse till they could call for them, which was assented to, and when they called for them the two cases were missing, and were never found. No charge was made for keeping the goods in the depot, and there was no offer to pay anything. Defendant's witness (the agent) states that, when plaintiffs requested him to let the goods remain there, he assented, but told plaintiffs that the goods would be at their risk. Plaintiffs say that they do not remember any such remark being made to them.

The responsibility of a railroad company keeping goods in its depot after the termination of the transit is that of a warehouseman for hire, and it is bound to use ordinary diligence in keeping the goods. *M. & G. R. v. Prewitt*, 46 Ala. 63, 68, 7 Am. Rep. 586. "A warehouseman is only bound to take reasonable and common care of the commodity intrusted to his charge." He is bound to the observance of "ordinary diligence"—such care and diligence as a man of ordinary prudence bestows on his own affairs. *Moore v. Mayor, etc., of Mobile*, 1 Stew. 284, 287; *Jones v. Hatchett*, 14 Ala. 743, 745. The rule of law is that if a bailee (such as a warehouseman) fails to deliver the goods intrusted to him, on demand, or does not account for said failure, "prima facie negligence will be imputed to him, and the burden of proving a loss without the want of ordinary care is devolved upon him." *Seals v. Edmondson*, 71 Ala. 509. The burden is on him to show that the goods "perished" were destroyed, lost, or stolen notwithstanding he had employed ordinary diligence in preserving it. *Hass v. Taylor*, 80 Ala. 459, 465, 2 South. 633; *Prince v. Ala. State Fair*, 106 Ala. 341, 346, 347, 17 South. 449, 28 L. R. A. 716; *Davis v. Hurt*, 114 Ala. 146, 149, 150, 21 South. 468.

In this case the defendant's agent testified that the depot in which the goods were kept was a safe and secure place, and that it was kept locked at night, and also in the day, whenever defendant's employees were not present. This being all the evidence on that subject, we think it was for the jury to determine whether or not that was ordinary care. Consequently there was no error in the refusal of the court to give charge No. 2 requested by the defendant.

Charge No. 3 requested by the defendant was properly refused by the court, as shown by the authorities heretofore cited.

Charge No. 4 requested by the defendant was properly refused. This charge was abstract, there not being any testimony to show that Aldredge "received the goods from the agent." On the contrary, the evidence is clear that said goods never went out of the possession of defendant's agent until they were lost.

For considerations before stated, there was no error in the refusal of the court to give charge No. 6 requested by the defendant.

Birmingham Ry., L. & P. Co. v. Willis

There was no error in the refusal of the court to give charge No. 7 requested by the defendant, as shown by the authorities heretofore cited.

The court erred in overruling the objection to the question to Aldredge as to how far plaintiff lived from Attalla, and also in refusing to give charge No. 8, as the distance of plaintiff's residence from Attalla had no legal bearing on the issue involved in this case.

Charge No. 9 requires too high a degree of proof.

The refusal to give charge 10 was cured by giving charges 5 and 11.

The judgment of the court is reversed, and the cause remanded.

McCLELLAN, C. J., and TYSON and ANDERSON, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. WILLIS.

(Supreme Court of Alabama, Feb. 9, 1905.)

[38 So. Rep. 1016.]

Appeal—Review.—Assignments of error as to rulings on pleadings, which the court withdrew from the jury, need not be considered on appeal.

Injury to Passenger—Contributory Negligence—Alighting from Moving Car.*—Whether a passenger is guilty of contributory negligence in alighting from a slowly moving street car is a question for the jury.

Appeal—Review.—A judgment of the trial court overruling a motion for new trial is prima facie correct, and will not be reversed unless plainly erroneous.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by Sallie Willis against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action of damages, based on alleged negligence of the defendant in operating its car, upon which the plaintiff was a passenger, whereby she was injured. The case was tried on pleas of the general issue and contributory negligence by the plaintiff. The plaintiff requested the following written charge,

*For the authorities in this series on the question whether it is contributory negligence for a passenger to alight from a moving train or street car, see foot-notes appended to *Mannon v. Camden Interstate Ry. Co.* (W. Va.), 15 R. R. R. 312, 38 Am. & Eng. R. Cas., N. S., 312; foot-notes appended to *Chicago Union Traction Co. v. Olsen* (Ill.), 15 R. R. R. 49, 38 Am. & Eng. R. Cas., N. S., 49; *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25; *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10.

Birmingham Ry., L. & P. Co. v. Willis

which was given: "(4) It is not necessarily and as a matter of law negligence for passenger to attempt to get off a slowly moving car." The defendant requested the following written charges, which were refused by the court: "(3) If the jury believe from all the evidence that the car was being slowly moved across Twenty-Sixth street preparatory to being stopped on the west side of Twenty-Sixth street, and that the plaintiff undertook to get off the car while it was so moving across that street, then I charge you that the plaintiff was guilty of contributory negligence. (4) If you believe from all the evidence that the car was being slowly moved across Twenty-Sixth street preparatory to being stopped on the west side of said Twenty-Sixth street, and that Twenty-Sixth street was the plaintiff's destination, and further believe that the plaintiff stepped from the car to the ground while it was being moved across Twenty-Sixth street, I charge you that the plaintiff was guilty of contributory negligence in stepping from the car at that time."

Walker, Tillman, Campbell & Morrow, for appellant.

Bowman, Harsh & Beddow, for appellee.

TYSON, J. We need only apply what was said with respect to the sufficiency of the first and sixth counts of the complaint in the case of *Armstrong v. Montgomery Street Railway Co.*, 123 Ala. 233, 26 South. 349, to see that the first count of this complaint as amended was not subject to the demurrer interposed to it. It is unnecessary to notice assignments of error as to rulings upon the sufficiency of the second count or the pleas interposed to it, since the court charged the jury, at the request of defendant, that there could be no recovery upon it. There was no error committed by the court in giving the fourth charge requested by plaintiff, or in refusing the third and fourth charges requested by defendant. Whether the plaintiff, under the evidence, was guilty of contributory negligence in alighting from the moving car, if the jury believed that she did so alight, was a question for the jury, and not one of law for the court. *B. R. & E. Co. v. James*, 121 Ala. 120, 25 South. 847; *Watkins v. B. R. & E. Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297, and cases there cited. This disposes of all assignments of error insisted on predicated upon the ruling of the court upon written charges.

The only ground of the motion for a new trial insisted on is that the verdict was contrary to, and against the weight of, the evidence. The evidence was directly in conflict on every material issue of fact. The case was one clearly for the determination of the jury. According the judgment of the trial court the prima facie presumption of correctness, and applying the principle that the judgment overruling the motion will not be reversed unless plainly erroneous, we are unwilling to affirm that the motion should have been granted.

Affirmed.

MCCLELLAN, C. J., and SIMPSON and ANDERSON, JJ., concur.

CHOCTAW, O. & G. Ry. Co. v. ROLFE.

(Supreme Court of Arkansas, July 1, 1905.)

[88 S. W. Rep. 870.]

Carriers—Failure to Furnish Cars—Complaint—Sufficiency.—An allegation in the complaint in an action against a railway company for failure to furnish cars that plaintiff had demanded of the company, through its agent at a designated station, that cars be furnished there, and that he had demanded of its agent at another designated station, who acted as agent for another station, that cars be furnished at the latter station, sufficiently shows demands of proper authority, and sufficiently apprises the company of the agents on whom the demands were made.

Same.—A complaint in an action against a railway company for failure to furnish cars which alleges that plaintiff placed for shipment at stations named certain quantities of lumber, and that he offered the same for shipment, sufficiently shows that the tender was to the respective station agents.

Same.—A complaint in an action against a railway company for failure to furnish cars which alleges that property was tendered for shipment and that cars were demanded in a certain month is sufficiently definite as to the time when the demands were made, where the stations were small, so that the company might ascertain whether such was the fact.

Pleadings—Unnecessary Allegations—Motion to Make Definite.—An unnecessary allegation in a pleading should not be made more definite and certain.

Agency—Evidence—Statements of Agents.—Where, in an action against a railway company for failure to furnish cars, it was shown that the agent at a station brought about a meeting between the shipper and an officer of the company designated as the "general manager," and an audience was secured with a person in the company's general offices with reference to securing cars, and such person was recommended as the "general traffic manager," and was in the office, doing business, the statements of the persons known as "general manager" and "general traffic manager" were admissible in evidence.

Carriers—Failure to Furnish Cars—Special Damages—When Recoverable.*—A shipper cannot recover special damages arising from a railroad company's failure to furnish cars as agreed unless the facts leading to the special damages are made known to the company.

Same.*—A shipper desirous of shipping logs showed them to the general manager of a railroad company, and explained the method and expense of loading them. The manager agreed to furnish cars. Held, that the shipper had a right to keep his teams necessary for loading on expense while waiting for the company's performance of the agreement, and on its failure to furnish cars he was entitled to recover the expense as special damages.

Appeal from Circuit Court, St. Francis County; Allen Hughes, Judge.

Action by E. A. Rolfe against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Peirce and T. S. Buzbee, for appellant.

N. W. Norton, for appellee.

*See foot-note appended to *Seaboard Air Line Ry. v. Harris* (Ga.), 15 R. R. R. 285, 38 Am. & Eng. R. Cas., N. S., 285; foot-note appended to *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420.

Choctaw, etc., Ry. Co. v. Rolfe

HILL, C. J. Rolfe was engaged in cutting and shipping logs, and had a quantity of them at Widener and Proctor Stations, on appellant's line of railroad. Darnall wanted to purchase them delivered on board the cars at these stations, and Rolfe was not willing to enter into the contract until he had assurances that he could get the cars for the shipments. Ward, representing Darnall, went to see the traffic manager of the appellant at Little Rock about the matter, and explained the situation; and he told Ward to make the contract, and the cars would be furnished. Rolfe saw the agent at Forrest City, and he arranged a meeting between Rolfe and the general manager of the road, who was coming over the line in a special car. Rolfe saw the manager, showed him the logs, and explained the situation to him; told him he would have gotten out the logs before if he had had cars, and about the expenses incident to loading them with teams. The general manager promised he would get the cars, and Rolfe proceeded to get out the logs for shipment to Darnall. Very shortly after the conversation with the general manager, in August, he received three cars at Proctor, and then did not receive any more cars till October, when he commenced receiving them again, and received 27 cars from October 11th to some time in January, when his logs were finally shipped. He kept teams for loading at Proctor during the interval from August to October, and was daily making demands of the various agents and officers of the road, from the agent at Edmondson, where orders for Proctor were taken, to the principal officers of the company. Rolfe sued for damages to the logs by reason of depreciation while loading them for shipment, and for expenses of his teams at Proctor from August to October; alleging it was necessary to keep them there, in order to load the logs when the cars arrived. The uncontroverted evidence placed the damages for depreciation at \$264, and the jury gave him that sum, and \$200 special damages on account of the expenses of his teams.

1. The first point made is that a demurrer to the complaint should have been sustained. The allegation of the complaint assailed by the demurrer is: "The plaintiff had a great number of times demanded of defendant, through its agents at Forrest City and at Widener, and at Edmondson for Proctor, and at other times by letters addressed to the defendant's principal offices at Little Rock, that cars be placed on the side tracks at said stations of Proctor and Widener, that plaintiff might load said logs." The objection is that there was no allegation that these agents had authority to furnish cars, and that it is not stated to what principal offices the letters were addressed. The allegation that he demanded of the agent at Widener for that place shows demand of the proper authority. 1 Elliott on Railroads, § 363. The allegation that Edmondson was the place to demand for Proctor, there being no agent at Proctor, is sufficient, and apprised the company of the agent upon whom demand was made; and, if he was not the agent in control of Proctor, that was a fact

Choctaw, etc., Ry. Co. v. Rolfe

peculiarly within the company's knowledge. The demurrer was properly overruled.

2. The appellant asked that the amended complaint be made more specific by setting out (1) to which of defendant's agents or servants plaintiff tendered the timber; (2) from which of said agents or servants he requested cars, and the exact times and places of said requests; (3) the exact number of times he requested cars from defendant's agent at Forrest City; and (4) the dates of the letters and the offices of defendant to which said letters were addressed. The complaint alleged that the plaintiff placed for shipment at the stations named certain quantities of logs, "and that he offered and tendered for shipment said timber." This allegation shows with reasonable certainty that the tender was to the respective station agents. The allegation is that the tender and demands were made in August, and the company certainly could ascertain from these small stations whether such was a fact. This is not analogous to the duty to furnish names or numbers of trains causing injury, for there are so many trains operated by different crews that it is only fair to definitely designate the train, in order that the company may properly learn the facts. The allegation about demand of the principal officers at Little Rock was unnecessary, and, of course, an unnecessary allegation should not be made more definite and certain.

3. Objection is made that incompetent evidence was introduced in the statements of Mr. Wood and Mr. Holden, who were described as "General Manager" and "General Traffic Manager," respectively, without proof of their official positions. The station agent at Forrest City brought about a meeting between Mr. Wood and Rolfe, and Mr. Wood took Rolfe into his special car and carried him to Memphis; and Rolfe understood from his relations to the company, the statement of the agent, and his actions that he was general manager or "president of the concern." Mr. Ward found Mr. Holden in the general offices of the company at Little Rock, and secured an audience with him there on the subject of securing cars if he entered into the contract to purchase the logs. "He was recommended to witness as the general traffic manager. He was in the office, doing business." The testimony was not incompetent.

4. The elements of damage are assailed. The depreciation in the logs during the time of the negligent failure to ship them is too plain for discussion. See Sutherland on Damages (3d Ed.) § 37. The damage arising from expenses of keeping the teams rests on a different proposition. These constitute special damages, were sued for as such, and specially found as such by the jury. For a breach of an implied contract of carriage, or the breach of any contract, before special damages are recoverable, the facts and circumstances leading to the special damages must be made known to the party to be charged, in order that he may properly avoid them. When thus made known, and the natural

Shamblin v. New Orleans & N. W. R. Co

consequences flowing from the special circumstance brought home to the contracting party, he is liable for the special damages. This rule and its application to implied contracts of carriage and delivery may be found discussed in *Ry. v. Ragsdale*, 46 Miss. 458; *Ligon v. Ry.*, 3 Willson Civ. Cas. Ct. App. § 1; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Crutcher v. C., O. & G. Ry. (Ark.)* 85 S. W. 770; *Hutchinson on Carriers*, §776. Applying the principles to the facts: The uncontroverted evidence shows that the general traffic manager had notice of the intended contract between Rolfe and his vendee, and that it was dependent on securing the cars, and that he told the parties to make the contract, and the cars would be furnished. Rolfe personally showed the logs to the general manager of the road, and explained the method and expense of loading them, and was assured that he would receive the cars, and did receive three cars shortly thereafter. He had a right to rely upon these assurances for a reasonable time, and keep his teams on expense, expecting the fulfillment of the duty to furnish the cars. The evidence shows he was very assiduous in his efforts to get the cars in the time of this delay. The jury gave him much less than his evidence showed his expenses were, and the court is of opinion that there is sufficient evidence of notice to the company of the special circumstances to render it responsible for special damages in keeping the teams for a reasonable time.

The judgment is affirmed.

SHAMBLIN v. NEW ORLEANS & N. W. R. Co.

(Supreme Court of Louisiana, March 27, 1905.)

[38 So. Rep. 421.]

Carriers — Injury to Passenger — Contributory Negligence.* — A freight train, in the caboose of which plaintiff was a passenger, having stopped to do some switching, plaintiff, without necessity, left his seat, where he would have been safe, and walked to the door, when

*See foot-notes appended to *Yazoo & M. V. R. Co. v. Humphrey* (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1; foot-note appended to *Illinois Cent. R. Co. v. Jolly* (Ky.), 11 R. R. R. 27, 34 Am. & Eng. R. Cas., N. S., 27.

For the authorities in this series as to what is, and is not, the proximate cause of an injury, see foot-note appended to *Birmingham Ry. Light & Power Co. v. Brantley* (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; *Snow v. New York, etc. R. Co.* (Mass.), 15 R. R. R. 47, 38 Am. & Eng. R. Cas., N. S., 47; *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, etc., R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

Shamblin v. New Orleans & N. W. R. Co

he was knocked off his feet by a jolt caused by the making of a coupling, and was injured. The evidence showed that, when such couplings were being made, jolts, such as might throw persons standing in the caboose off their feet, might be looked for, and that a warning of this danger, in large, glaring letters, was posted on the wall of the caboose, and that the plaintiff was in the habit of riding in the caboose. Held that, both from his having ridden before in the caboose, and from the posting of the notice, plaintiff must be presumed to have known of the danger, and that, even though the coupling was negligently made, yet plaintiff cannot recover, because his act in standing up was one of the proximate causes of the accident, and was negligent, constituting contributory negligence.

(Syllabus by the Court.)

Appeal from Eighth Judicial District Court, Parish of Franklin; David Newton Thompson, Judge.

Action by James W. Shamblin against the New Orleans & Northwestern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hudson, Potts & Bernstein, for appellant.

Ellis & Dorset (Bernard Titcher, of counsel), for appellee.

PROVOSTY, J. The plaintiff was a regular passenger in the caboose of one of the freight trains of the defendant company. The train stopped to pick up a car which stood on a spur track ahead. The front part of the train, consisting of 18 loaded cars, went forward, leaving the caboose and five cars, also loaded, standing on the main track. After going into the spur, which was some 250 to 300 feet ahead, the train backed down upon the standing cars to couple to them. The time it took to do this appeared long to plaintiff and his son, as they sat in the caboose. They got up and walked to the rear end of the caboose, to try to ascertain, they say, the cause of the apparent delay. Just then, and while plaintiff was standing near the door, and his son back of him, the sudden movement of the caboose, from the impact of the forward cars, in the making of the coupling, threw both men to the floor; and plaintiff, in falling, put out his arm, and, falling upon it, broke it. For this injury he brings this suit in damages, claiming that it was the result of the negligence of the employees of the defendant company in bringing the train against the stationary cars with unnecessary force. Defendant denies that the coupling was negligently made, and, in the alternative, pleads that, even if there was negligence, plaintiff cannot recover, because his standing up in the caboose, instead of keeping his seat, when he knew that a coupling was about to be made, was contributory negligence.

Whether the coupling was negligently made is left by the evidence in some doubt. Plaintiff says that he was accustomed to riding in the caboose of a freight train, and that the "lick" given to the caboose on that occasion was unusually hard; that the train must have been going 30 miles an hour. The son, 23 years old, testifies:

"I don't believe I ever witnessed as hard a jar for the purpose

Shamblin v. New Orleans & N. W. R. Co

of coupling. I have seen some pretty hard jars, too, but never one hard enough to knock me down."

This witness admits that he knew it was unsafe for passengers to stand or walk about in the caboose of a freight train while in motion, but says that the train was not in motion. He also knew that the coupling might be made at any moment, but says that he expected a signal. Plaintiff's witness Rollison, who was standing within 10 feet of the track, does not say that the coupling was made with unusual violence. To the question, "What rate of speed was it traveling?" he answered:

"I wasn't paying any attention to it at all until the brakeman and conductor went in there and went to work."

Further on he says:

"I don't know anything, except that when the cars hit together I was looking down on the ground, talking with Mr. Tarver, and when I looked up the car was running apart, with one drawhead driven up."

He had testified in chief that "when the engineer came back to make the coupling he came at such speed that he drove the drawhead out," and also that the caboose rolled back 10 or 15 feet. This witness' testimony is merely inferential, and the main basis of his inference (the driving "up" or "out" of a drawhead) is pure assumption, no drawhead having been driven in or up or out, but only a worn-out coupler key driven out—a not unfrequent occurrence, it seems. Plaintiff's witness Smith testifies that the breaking of these keys is frequent, and that heavy jars are of common occurrence in coupling trains; that it is considered unsafe for passengers to walk in the caboose while the train is in motion or switching; and that a notice to that effect is posted conspicuously on the wall of the caboose. This witness also says that a train of 23 loaded cars requires about a mile or a mile and a half to get under full headway, and that such a train cannot acquire much speed in two or three hundred yards. Plaintiff's witness Tarver was standing within 50 feet of the track. To the question, "Just say what happened?" he answers:

"All I know, the train made a switch in there to get a box, and when they got it they went to couple it, and they made the coupling, and they broke some part of the drawhead in one of those cars. I don't know what part, but I know it was broken."

On cross-examination he said that for making the coupling the train was "moving tolerable fast." "Why, I suppose I could call it faster than they usually go. This is, from the way I have noticed."

In behalf of defendant, the conductor testified that the train backed at the rate of about four miles an hour—about as fast as a man walks—and that the jolt was not unusually hard; that nothing was broken or injured in the coupling; that a badly worn key of the seventh car jumped out; that a supply of such keys are kept in the caboose in anticipation of such a contingency; that it is dangerous to stand in the caboose while the train is

Shamblin v. New Orleans & N. W. R. Co

moving or switching; that a printed warning to that effect was posted on the wall of the caboose, "right where the plaintiff could see it." This warning is brought up in the record. It is a piece of buff-colored card-board 9x12 inches, on which is printed, in heavy faced, glaring, black letters, of approximately an inch and a quarter, the word "Danger," and just above, in letters somewhat smaller, but equally heavy faced, the words "Warning Notice." Below the word "Danger" is the following:

"Passengers are forbidden to occupy the movable seats, or stand up in this car, while it is in motion, or while switching is being done."

The conductor further testified that the usual warning signal was given by the ringing of the bell. He also testifies that at the proper time he gave the signals to back up and to stop; that the engineer obeyed the signals; that the train was checked 60 feet from the stationary cars; that he was paying attention to the coupling; and that no unusual blow was given. He also testifies that a person paying ordinary attention would have heard the repeated jars as the slack went out from car to car. He also testified that the stationary cars and caboose did not roll at all under the impact of the train, but that, in order to allow the replacing of the coupler key, the train was uncoupled and moved 10 or 12 feet. The engineer testified that the coupling was not made with unusual force; that the caboose was not backed; that the bell was ringing as the train was backing; that it is not customary to sound the whistle; that the speed was about as a man walks. The brakeman who stood between the cars to make the coupling testifies that the speed was not unusual; that, if it had been, he would not have gone between the cars to make the coupling; that the key which jumped out was worn. The joint agent of the defendant railway and of the St. Louis, Iron Mountain & Southern Railway at Collinston testifies that there is decidedly danger in standing in the caboose while the train is moving or switching, and that that is the reason why the glaring notice of danger is posted in the caboose; that, if there are several cars attached to the engine, there is frequently considerable jar. The brakeman who opened the switch of the spur testified that the train was not backed up faster than usual. The fireman testified that the train moved at about four miles an hour, that he was ringing the bell, and that it is not customary to sound the whistle.

Plaintiff recalled the engineer, making him his witness, and asked him whether he had not said that the train was running at the rate of 10 miles an hour; and the witness answered, "No, sir; I did not." Thereupon plaintiff called witnesses who testified that on the day before the trial some one had asked the witness, "Didn't he hit them cars about 40 miles an hour?" and that he had answered, "No; I hit them at the rate of about 10 miles." These witnesses did not know whether this question and answer had been jocular or serious.

Shamblin v. New Orleans & N. W. R. Co

The witness Rollison, on being recalled by plaintiff, testified that the conductor, as he stood between the uncoupled cars, made the remark, "He didn't know what in the devil the fellow meant by trying to tear up things;" alluding to the manner in which the engineer had backed the train. The witness Tarver, recalled for plaintiff, testified that he heard the conductor make a complaint about the engineer having "come in there too hard."

Were it not for this testimony as to this comment of the conductor on the manner in which the coupling had been made, there would be no doubt at all that the coupling had been unattended by any negligence. The fact that the two men were thrown off their feet, and that another man was thrown out of a chair, which plaintiff's learned counsel looks upon as itself proof of recklessness in the handling of the train, is nothing but what might be expected at any moment in the caboose of a heavy freight train. The schedule time of the train was 18 miles an hour, and the testimony is that to get this train under full headway would have required a space of 3 miles, whereas the space between the stationary cars and the point from which the train started towards them was barely 300 feet. In view of these facts, the statement of plaintiff that the train must have been moving at 30 miles an hour would not have been very much more extravagant if it had fixed the speed at 100 miles an hour; also, in view of these same facts, the question to the engineer, whether he struck the caboose at 40 miles an hour, was foolish, if not meant to be jocular; and the answer of the engineer must have been jocular, for it was contradictory of his statement in his official report, and also of the testimony which he had come for the express purpose of giving. Defendant asked that the case be reopened for the purpose of affording an opportunity to prove that the question and the answer had both been meant as a joke, and the request was refused. It is noteworthy that, having made the witness his own, plaintiff was bound by his answer to the effect that he had made no such statement.

The remark of the conductor that he did not know what the engineer meant by tearing up things may have been the thoughtless utterance of a man giving vent to his ill humor at a perhaps avoidable accident, which kept him that much longer away from his home on New Year's Day morning, or it may have been an expression of opinion, on the spur of the moment, by the very man under whose direction the coupling operation was conducted, who, of all those present, was best qualified, by opportunity for observation, and probably by expert knowledge, to form an opinion in the premises. If it were the latter, our conclusion would have to be that the train was not handled with due care, and that, considering the high degree of care required of a railroad carrying passengers, the defendant was primarily responsible.

We shall leave the question open, as there is another and a sure ground upon which the case may be rested, even assuming that the defendant was negligent. It is that the plaintiff con-

Shamblin v. New Orleans & N. W. R. Co

tributed to the accident by his own negligence in remaining standing in the caboose at a time when a coupling might be made at any moment, and that this contributory negligence precludes recovery.

Plaintiff admits that if he had remained seated he would not have been injured. Therefore his act of leaving his seat and standing was one of the proximate causes of the accident, and, under well-settled law (Rapalje, Dig. vol. 2, p. 440), precludes recovery, if it was done negligently; that is to say, if it was done without necessity, and with knowledge, actual or presumptive, of the danger. That it was done without necessity, the record leaves no doubt. Plaintiff assigns no reason for it, except that he wanted to ascertain the cause of the delay, and neither he, nor anybody else, says that the delay was unusual. Nor is there more room to doubt that plaintiff knew of the danger. He was in the habit of riding in the caboose of this same freight train, and the proof is abundant that, whenever the train was in motion or switching, passengers in the caboose had to look for jars and jolts such as might throw them off their feet, no matter how carefully the train was handled. Moreover, there was posted on the wall of the caboose, "right where he could see it," a notice, in large, glaring letters, warning him of the danger. He does not say he did not know of the danger. If he did not, the burden was on him to prove the fact. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409. We much suspect that the impatience of plaintiff and his son to get home on the New Year's Day morning made the time seem long to them, and that the exhilaration they had imbibed made them oblivious or reckless of the danger.

In the case of *Krumm v. St. Louis, I. M. & S. Ry. Co.*, 76 S. W. 1075, the Supreme Court of Arkansas held (syllabus), as follows:

"One standing in the caboose of a moving freight train, which contained in a prominent position a warning to passengers against standing while the train was in motion, was guilty of negligence contributory to his injury, and barring a recovery therefor, though he had risen to get a drink, and was waiting for the water to be cooled."

In the case of *Harris v. Hannibal & St. J. R. Co.*, 1 S. W. 325, 58 Am. Rep. 111, the Supreme Court of Missouri approved an instruction given in a former case as follows:

"If the jury believe from the evidence that plaintiff knew, or by the exercise of ordinary care could have known, that the train had stopped to do some switching, and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, and that the plaintiff then, without thinking about the approach of the cars, and without paying any attention as to whether the cars were approaching or not, left his seat, and stood up in the car, and was thrown down and injured, when he would

Price v. St. Louis, etc., Ry. Co

not have been, had he kept his seat, or resumed the same before the cars struck, then the plaintiff was guilty of such contributory negligence as bars his recovery, and the jury must find for defendant."

There is nothing opposed to this in any of the cases cited by plaintiff. Nothing that is here said tends in the slightest degree to relax the stringency of the rule exacting the highest degree of care in railroads carrying passengers, whether on freight or on regular passenger trains. The law in that connection is well stated by Judge Hooker, as organ of the Supreme Court of Michigan, in the case of *Moore v. Saginaw, T. & H. R. Co.*, 115 Mich. 103, 72 N. W. 1112, cited by plaintiff:

"One who takes passage upon such a train, where the object and principal business is the transportation of freight, cannot insist upon the same equipment as is usual upon regular passenger trains. He will be presumed to understand that different cars and couplings and brakes are used, and that cars must be coupled and uncoupled and shifted in the course of yardwork at the various stations; that jars and jolts and jerks and concussions are incident to the ordinary management; and that these necessarily affect the equilibrium of persons standing in the car. We may take judicial notice that it is difficult, if not impossible, to handle trains of varying length and weight upon roads of varying grade without concussions; and passengers must be expected to know this, and assume the risks incident to such methods, where the crew handles the train with the highest degree of care which good railroading requires and permits under the circumstances. But if a less degree of care is bestowed upon the management of the train, it is negligence; and, if a passenger is injured thereby, without being in fault himself, the company is liable."

In the instant case, plaintiff was at fault.

Judgment set aside and suit dismissed, with costs in both courts.

PRICE et al. *v.* ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, May 27, 1905.)

[88 S. W. Rep. 575.]

Carriers—Injury to Drunken Passenger—Negligence—Contributory Negligence—Question for Jury.—In an action against a railroad company for the death of a drunken passenger, who, it was alleged, was placed in charge of defendant's conductor, and was by him negligently permitted to go onto the platform and fall from the train, evidence held to justify submission to the jury of the issues of defendant's negligence and the contributory negligence of deceased.

Same—Acceptance of Intoxicated Person as Passenger.*—A railroad company is not required to accept as a passenger, without an

*See foot-note appended to *Tuttle v. Cincinnati, etc., Ry. Co.* (Ky.), 13 R. R. R. 333, 36 Am. & Eng. R. Cas., N. S., 333, where all the preceding authorities in this series are collected.

Price v. St. Louis, etc., Ry. Co

received the deceased in such insensible and irresponsible condition, well knowing the same, and, having divested him of all his valuables, including about twenty-seven dollars in money, said conductor took charge of his money, valise, and other valuables, for which he gave a receipt to said proprietor of the hotel, and said conductor caused the deceased to be laid down on the seats near the door of the smoking car of said train, and there left him, and that the defendant received said deceased, and undertook to transport, carry, and safely deliver him at Newport, Arkansas, well knowing the insensible and irresponsible condition of said deceased. That after having deposited the deceased in said smoking car, the conductor, brakeman, and other employees of defendant on said train paid no further attention to the deceased, and negligently and carelessly failed to exercise any diligence or care whatever with respect to said deceased, by reason of which he came to his death. That just before said train reached the station at said Cabot, it being then nighttime, the deceased awoke from his drunken stupor, in a dazed and bewildered condition, and, not knowing or realizing his situation or whereabouts, while in said drunken and irresponsible condition, arose, and without being warned, cautioned, or restrained as he should have been, staggered through the door of the car, which was but a few feet distant, and out upon the platform of said car—the train being then moving at great rate of speed—and was thrown from said car to the ground, thereby receiving mortal injuries, from which he died, and which could and should have been prevented by the exercise of proper care by the defendant, and that his dead body was discovered lying upon or near the defendant's railway track, horribly mutilated, on the morning of the 17th of December, 1898. That upon the arrival of said Cannon Ball train at Newport, the said conductor left the valise belonging to said deceased at the depot at Newport; stating that deceased was lost somewhere between Little Rock and Newport." That deceased at the time of his death was earning a total income of \$4,000 per annum. The plaintiffs were obliged to expend \$500 for the burial expenses of deceased, and, by reason of the wrongs and injuries complained of, had sustained damages in the sum of \$10,000, for which they prayed judgment. The defendant, for its answer, denied every material allegation in the complaint, save that it was a corporation and common carrier, and that the deceased was intoxicated, and alleged contributory negligence of the deceased, and that whatever injuries he received were due to his intoxication and want of care. There was a trial at the November term, 1900.

The proprietor of the hotel, who put deceased, Price, on the train, testified, so far as his evidence is material here, as follows: "I took him in, and he had a valise, with a quart bottle of whisky in it. I put him in care of the conductor, and paid his fare, and gave the remainder of his money to the conductor, to take care of until he got home. I told the conductor he was un-

St. Louis, etc., Ry. Co. v. Reed

for several years, he did not know that he was a conductor, but supposed that he was a brakeman, and did not ask him if he could go with him. But after having this conversation with Gentry, Reed obtained a leave of absence from his company, and then went and boarded the caboose attached to the through freight train on which Gentry was conductor. This train was not at the depot, but was standing on what was called the caboose track, near the stock pens, and some distance away from the passenger depot. None of the employees of the company were at the caboose before Reed boarded it, but he saw some of them there before the train pulled out. He did not buy a ticket, and paid no fare. He understood that the train which he boarded was a through freight, but says he did not know that it did not carry passengers. The conductor testified that when Reed met him at Texarkana "he asked me when I was going out, and wanted to know if there would be any show for him to go up the road with me. I told him I supposed it would be all right; that the caboose was in the yard, and I did not think that anybody would see him or find out if he went up with me." He further testified that nothing was said about fare, that he did not collect any fare and did not intend to collect any. The train left Texarkana about 5 o'clock, and the night following, about 50 miles north of Texarkana, at Boughton, another train accidentally ran into the caboose, and Reed's leg was broken above the ankle, and he received other injuries. He brought an action against the company to recover damages. The company set up that it was against its rules and regulations for conductors to carry passengers on through freight trains, and that the plaintiff was on the train without its permission and was a trespasser, and the company was not responsible for his accidental injury. There was a verdict and judgment against the company in favor of plaintiff for \$500, from which it appealed.

B. T. Johnson, for appellant.

E. H. Vance, Jr., and *Andrew I. Roland*, for appellee.

RIDDICK, J. (after stating the facts). This is an action by the plaintiff to recover damages received while riding on one of the defendant's through freight trains. The rules and regulations of the company did not allow the conductors of such trains to carry passengers. The plaintiff in this case was an employee of another railroad company, but, being an acquaintance of the conductor who had charge of this train, he was permitted by him to ride in the caboose attached to it. The plaintiff testified that he did not know that it was against the rules of the company to carry passengers on such trains, but, leaving out the testimony of the witnesses for the defendant on this point, the question arises whether the undisputed facts do not show that he either had notice, or, what is the same thing, that he had notice of facts sufficient to put him upon inquiry, and that if he had made any inquiry he could easily have ascertained the fact

St. Louis, etc., Ry. Co. v. Reed

that the employees of this train had no right to accept him as a passenger. Now, plaintiff did not find this train at the passenger depot. He boarded it in the yards of the company, near the stock pen. It had no passenger coach attached, and there was nothing about it to indicate that it was intended for the carriage of passengers. Plaintiff himself shows that, though he had time and opportunity to inquire and ascertain whether passengers were allowed to be carried on this train, he did not do so. When we consider that plaintiff was 53 years old, had worked for railroads about 15 years, and was then at work at Texarkana for the Cotton Belt Railway Company, while his family lived at Malvern, a town on defendant's railway, between which place and Texarkana several passenger trains were run each day, one of which trains was due to leave Texarkana only a few hours after plaintiff left on the freight, and by which plaintiff could have reached his home as soon as, or sooner than, he could have reached it by the freight train, even had there been no accident; when we consider that plaintiff took this freight, on which an acquaintance was conductor, when he could have taken a passenger train and made better speed, and that up to the time of the accident he had neither paid nor offered to pay, nor been asked to pay, any fare—it seems not unreasonable to believe, as counsel for defendant contends, that he chose this train in preference to the passenger because he had grounds to hope that through the courtesy of his friend, the conductor, he would be given free transportation. But we need not discuss that feature, for it is quite immaterial. For, conceding that plaintiff acted in good faith in getting on this train, it is clear that he acted carelessly. One should not get on the caboose of a through freight train, standing away from the passenger depot, in the yards of the company, near a stock pen, with the intention to travel thereon as a passenger, without making some inquiry as to whether the train is intended for passengers. If, without inquiring, he does get on such a train, not intended for passengers, and is carried safely to his destination, he gains that much at the expense of the company. On the other hand, if an accident happens, and he is injured, there is no reason or justice in requiring the company to pay for his injuries, unless they have been wantonly or willfully inflicted. "When," said Chief Justice Cockrill, "there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger; and, if he claims that he is, it devolves upon him to show a state of case that will rebut the presumption." *Hobbs v. Texas Pacific Ry. Co.*, 49 Ark. 360, 5 S. W. 586. The facts in this case do not rebut this presumption, but show conclusively that the circumstances under which plaintiff boarded this train were sufficient to give him notice that this train was not intended for the carriage of passengers. Whether in fact he believed it was intended for passengers is a matter of no moment, for, although members of the train crew were present, he made no

Choctaw, etc., R. Co. v. State

inquiry, and cannot hold the company responsible for his ignorance. The law in such a case treats him as knowing those things which he could and should have ascertained by inquiry. This question has been fully discussed by a recent decision of the Court of Appeals, to which we refer. *Purple v. Union Pacific R. Co.*, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. 700. Had plaintiff been a boy or person of immature years, there would be more reason to support the judgment, but the facts in this case show that plaintiff, and not the company, was to blame for his presence on this train. He was injured by a collision which the evidence shows was the result of carelessness, but was not the result of wanton or willful negligence. On the whole case, we are convinced that it would be unjust to compel the company to pay damages for the injury to plaintiff, which was caused by his getting on a train not intended for passengers, in violation of the rules of the company.

Judgment will therefore be reversed, and the action dismissed. It is so ordered.

CHOCTAW, O. & G. R. CO. v. STATE.

(Supreme Court of Arkansas, May 6, 1905.)

[87 S. W. Rep. 426.]

Separation of White and Colored Passengers—Equal Accommodation.*—Under Kirby's Dig. § 6622, requiring railways to provide separate waiting rooms, "of equal and sufficient accommodations," for the two races, at all passenger depots, it is not necessary for a railroad to furnish the same accommodations for each race, nor that the waiting rooms be of the same dimensions, but the object of the statute is merely to prevent discrimination.

Same—Same—Violation of Statute—Indictment—Sufficiency.—Under Kirby's Dig. §§ 6622, 6634, 6636, requiring railroads to provide separate waiting rooms, of equal and sufficient accommodations, for the two races, at passenger depots, defining the requisites of the accommodations to be furnished, and making a violation thereof a misdemeanor, an indictment charging a railroad with unlawfully failing and refusing to provide waiting rooms, of equal and sufficient accommodations, for the white and African races at its passenger depot in a certain town, is bad, in that it fails to allege wherein the accommodations provided were not equal and sufficient.

Hill, C. J., dissenting.

Error to Circuit Court, Sebastian County; Styles T. Rowe, Judge.

The Choctaw, Oklahoma & Gulf Railroad Company was convicted of a misdemeanor, and appeals. Reversed.

E. B. Pierce and *Thos. S. Buzbee*, for appellant.

BATTLE, J. On the 6th day of January, 1904, the grand jury

*For the authorities in this series on the duty to furnish separate cars for white and colored passengers, see foot-note appended to *Louisville & N. R. Co. v. Commonwealth* (Ky.), 10 R. R. R. 262, 33 Am. & Eng. R. Cas., N. S., 262.

Choctaw, etc., R. Co. v. State

of Sebastian county returned an indictment against the Choctaw, Oklahoma & Gulf Railroad Company in words and figures as follows:

"The grand jury of Sebastian county for the Greenwood District thereof, in the manner and by the authority of the state of Arkansas, accuse the defendant, Choctaw, Oklahoma & Gulf Railroad Company, of the crime of misdemeanor, committed as follows, to wit: The said defendant, a corporation owning and operating a line of railroad running through the Greenwood district of Sebastian county, Arkansas, and maintaining a passenger depot at Hartford, in the county and district aforesaid, and carrying passengers therein, on or about the 1st day of June, 1903, unlawfully did fail and refuse to provide separate waiting rooms, of equal and sufficient accommodations, for the white and African races at their said passenger depot at Hartford, in the county and district aforesaid, the said railroad not then and there being a street railroad, against the peace and dignity of the state of Arkansas. Ben Cravens, Prosecuting Attorney Twelfth Judicial District."

The defendant demurred to the indictment because the facts stated therein do not constitute a public offense. The demurrer was overruled. The defendant was tried and convicted, and appealed to this court.

This indictment was founded upon statutes (Kirby's Digest) which, so far as applicable to this case, are in the following words:

"Sec. 6622. All railway companies carrying passengers in this state shall provide * * * separate waiting rooms of equal and sufficient accommodation for the two races at all of their passenger depots in this State."

"Sec. 6634. All persons who own or operate any line or lines of railroad in this state shall keep separate waiting rooms now provided for in section 6622 in all depot buildings now erected or that may hereafter be erected, for the accommodation of their passengers, open both day and night for the free and unrestrained use of their passengers. And that said waiting rooms shall at all proper times and seasons be comfortably heated and at all times supplied with wholesome drinking water, and shall in all respects be kept and maintained in a sanitary and clean manner. Provided, however, that railroad lines running neither freight nor passenger trains over said lines after night shall be allowed to close their waiting rooms at seven o'clock p. m. and open their waiting rooms to the public at six o'clock a. m."

"Sec. 6636. All railway companies that shall refuse and neglect to comply with the provisions and requirements of this act shall be deemed guilty of a misdemeanor and shall, upon the conviction before any court of competent jurisdiction, be fined not less than one hundred dollars nor more than three hundred dollars, and every day or night that such railway company shall fail to comply with the provisions of this act shall be a separate offense," etc.

American Express Co. v. Jennings

The indictment is ambiguous. Did it mean to say that the defendant failed and refused to provide separate waiting rooms for the white and African races at its passenger depot at Hartford? If so, why did it say that it failed and refused to provide separate waiting rooms, of equal and sufficient accommodations, for the white and African races at its passenger depot at Hartford? If it meant to say that it failed to provide waiting rooms for both races, the use of the words "of equal and sufficient accommodations" was unnecessary and meaningless. They were certainly used for some purpose, and we understood that purpose to be to show the kind or class of waiting rooms that was not furnished.

It does not appear in the indictment that the waiting rooms provided for both races were of insufficient accommodations, or for which race the waiting rooms provided was not of sufficient accommodations, and it is not alleged wherein the accommodations were not sufficient or equal. "Sufficient" does not show what was meant by the use of that term. What one man or set of men might consider sufficient would not be so considered by another. The same may be said of the word "equal." The accommodations need not be the same. If as good, they would be of equal, within the meaning and spirit of the statute; its object being to prevent discrimination. In this sense, one might consider accommodations equal, when another would not. Hence it was necessary to allege in the indictment wherein the accommodations provided, if any, were not equal and sufficient. Until this is done, the defendant cannot know fully for what it is indicted. *St. L. & S. F. Ry. Co. v. State*, 68 Ark. 251, 57 S. W. 796.

The waiting rooms need not be of the same dimensions. The accommodations must be equal and sufficient. The rooms could be used by the defendant for other purposes when not needed by passengers, and it does not interfere with the exercise of their rights under the statutes.

The demurrer should have been sustained.

Reversed and remanded, with instructions to the court to sustain the demurrer.

AMERICAN EXPRESS CO. v. JENNINGS.

(Supreme Court of Mississippi, May 15, 1905.)

[38 So. Rep. 374.]

Loss of Freight—Ownership.—Where plaintiff sent a piston rod to a machinist for repairs, and the rod, with other parts added by the machinist, was shipped to plaintiff C. O. D., in an action by him against the carrier for loss of the rod, etc., an instruction to find for plaintiff the value of the property which belonged to him and was not delivered was erroneous, as assuming that the shipment belonged to him.

Same—Damages.—The owner of a cotton gin sent a piston rod—

American Express Co. v. Jennings

necessary to operate his gin—to a machinist for repairs, and the rod was lost by the carrier by whom it was shipped to the owner, and he sued the carrier for damages owing to the enforced idleness of his gin. Held, that an instruction authorizing the jury, in determining the rental value of the gin, to consider time lost by plaintiff in going to defendant's office to inquire about the piston rod, was erroneous.

Same—Same—Use for Special Purpose—Notice.*—The defendant carrier could not be held liable for special damages owing to the enforced idleness of the gin in the absence of a showing either that it had notice of the special circumstances before it received the shipment, or that the initial carrier contracted for a through shipment, and had such notice before receiving the shipment.

Appeal from Circuit Court, Coahoma County; Sam. C. Cook, Judge.

Action by R. J. Jennings against the American express Company. From a judgment in favor of plaintiff for \$419.45, defendant appeals. Reversed.

The instructions referred to in the opinion are as follows:

Instructions given for plaintiff: "No. 1. The court instructs the jury to find for the plaintiff the value of the property consigned to him that belonged to him and was never delivered." "No. 3. The court instructs the jury, for the plaintiff, that at the time, to wit, the 16th day of December, 1903, the defendant received from the Southern Express Company certain machinery to be transported by it and delivered to plaintiff at Scobey, Miss., the defendant had notice that the plaintiff's gin and mill were shut down, and would remain idle until such goods were delivered to plaintiff, and that defendant's agent at Scobey agreed with plaintiff that the property was in Memphis, and that defendant would bring it down and deliver it that night or the next morning, and that thereafter defendant, through its agent at Scobey, promised plaintiff that it would be there on the next train, and by successive promises kept plaintiff waiting for the machinery until the early part of January, 1904, and then notified plaintiff that they had lost the machinery, and would not deliver it at all, and plaintiff quickly ordered other machinery in its place, which was promptly sent, and promptly received by plaintiff on the 7th day of January, 1904, and that the first machinery was lost by defendant and never delivered to plaintiff, then they will find for plaintiff, not only the value of the machinery lost that belonged to him, but all damages that have accrued to him on account of the delay and loss of the machinery; and, in estimating plaintiff's damages, they should be governed by the fair rental value of the machinery that was shut down, and, in determining the fair rental value, they may take into consideration the season of the year, that the machinery was located in a cotton country, and all the facts and circumstances surrounding the parties, and may also take into consideration any time lost by plaintiff in going to the depot or office of the defendant and making inquiry about the machinery lost."

*See foot-note appended to *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420.

American Express Co. v. Jennings

Instruction No. 4 refused for defendant: "No. 4. The court instructs the jury that plaintiff cannot recover for the reasonable value of his gin, or any other damages, unless they believe, from a preponderance of the evidence, that the defendant had notice of the importance of the shipment and of its prompt delivery at some time before the shipment had been lost, or had been misplaced or miscarried."

Defendant's motion for a new trial was overruled, and it appeals.

D. A. Scott, for appellant.

A. J. McCormick, for appellee.

Cox, Special Judge. The appellee here, who was plaintiff below, was engaged during the fall of 1903 in operating a cotton gin in the town of Scobey. Some time near the middle of December he broke a piston rod—the same being necessary to the operation of his gin machinery—and sent the same, under a hurry order, to the Adams Machine Company, at Corinth, for immediate repair and return. The rod was repaired and certain other necessary parts added by the Adams Machine Company, and all were delivered to the Southern Express Company, consigned to appellee at Scobey, Miss., marked "C. O. D. \$16.00," on the 15th day of December. The articles so consigned were received by the American Express Company, a connecting line (appellant here and defendant below), at Memphis on December 15th, and on the same day were forwarded to appellee at Scobey, Miss. They were in some unaccountable way lost in transit, were never found, and consequently never delivered. On January 1st appellee, having been definitely informed that the missing pieces were lost and could not be found, ordered duplicates, which were forwarded to him, and received at Scobey on January 7th. In the meantime appellee's gin had been standing idle because the machinery could not be run without the piston rod and other repairs which had been lost as above set out. The Adams Machine Company filed a claim against appellant for the lost shipment when they received the second order from appellee, and later received from appellant \$20.50 in full of all damages. Of this they sent appellee \$4.50, the value of the piston rod, which sum, on the advice of his attorney, who had made demand of appellant for the damages suffered by appellee, he returned. Appellee then sued appellant for damages suffered in consequence of appellant's failure to promptly transport and deliver the piston rod and attachments, and received a verdict and judgment for \$419.

The judgment must be reversed. Instruction No. 1 for plaintiff is erroneous, in that it assumes that the property consigned to him belonged to him, when the evidence, as to the greater part of it, shows the contrary.

Instruction No. 3 for plaintiff is erroneous, in that it authorizes the jury, in determining the rental value of his machinery,

American Express Co. v. Jennings

to take into consideration any time lost by plaintiff in going to the depot or office of the defendant and making inquiry about the machinery lost. The time so lost could have no relation whatever to the rental value of the machinery, and is not properly an element of damage in this case.

Instruction No. 4 asked for defendant should have been given. Defendant was entitled to even a more favorable statement of the law than was contained in this refused instruction. Certainly it could not be made liable for special or extraordinary damages unless notice of the importance of the shipment and prompt delivery had been made at some time before the shipment had been lost or had been misplaced or miscarried.

Instruction No. 5 for defendant, as modified by the court, is clearly erroneous; but, as the original instruction is not itself correct, in the absence of any proof in the record that the contract of affreightment with the Southern Express Company was a through contract, of whose terms the connecting carrier, the American Express Company, had the right to avail itself, defendant could not complain of the modification.

Inasmuch as the case must be tried anew, it is proper that we state the law with regard to the measure of damages applicable to this case and others of like character. In the leading case of *Hadley v. Baxendale*, 9 Excheq. 341—a case in its facts very much like the case at bar—the court said: “Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e., according to the usual course of things) from such breach of contract itself, or as such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.” This luminous statement of the law as to special or extraordinary damages has been very generally

American Express Co. v. Jennings

adopted in the jurisdictions administering the common law. 8 Am. & Eng. Ency. of Law, 584-5, notes; 1 Sutherland on Damages (3d Ed.) § 45; 14 Cyc. 34; 3 Wood on R. R. 454; 2 Beach on Railways, § 948. It was adopted by this court in the leading case of V. & M. R. R. v. Ragsdale, 46 Miss. 458, and has been uniformly adhered to since. The rule as above stated is established not only in authority, but also in reason. If one of the parties to a contract is to be made liable for extraordinary damages, it is right that before the contract is made he should have notice of the exceptional circumstances that may warrant them, in order that he may decline, if he wish, to make a contract to which such enhanced liability may attach, or may make special stipulations for increased compensation. He has the right to do either, and is entitled to notice to that end. If he, however, enter into the contract, or if, being a common carrier, he receive an article for transportation, after having received from the other party notice of the special circumstances, he is conclusively presumed to have contracted with reference to the enlarged liability. It is also to be remarked that he is entitled to notice of the special circumstances, in order that he may use special diligence and employ extra precautions to guard against the increased risk.

Counsel for appellee, while conceding the correctness of the rule as a general proposition, contends that "it makes no difference whether the carrier had notice of the special purpose to which the consignee intends to put the machinery at the time of the contract of affreightment, provided such notice is given it during the period of transportation, and in such event the carrier will be liable for special damage accruing for unreasonable delay after such notice is given." The only one of the five cases cited in support of this proposition which seems clearly to support it is the case of Gulf, C. & S. F. Ry. v. Gilbert (Tex. Civ. App.) 22 S. W. 760; but the Supreme Court of Texas, on a rehearing of this case, admitted error in the former decision, and delivered a strong opinion repudiating the modification of the rule contended for by counsel, and declaring that "it is not enough to give notice to the carrier after the contract is made, and the shipment has started in its transportation, because the liability of the carrier cannot be increased by the subsequent knowledge of facts that did not exist in the contemplation of the parties at the time the engagement was entered into. It then became an effort upon the part of one of the contracting parties to inject a stipulation into the contract after it was entered into that increases the liability of the other, that was not mutually considered when the engagement was made." Gulf, C. & S. F. Ry. Co. v. Gilbert (Tex. Civ. App.) 23 S. W. 320. The modification contended for it is not supported by authority, is not founded in reason, and will not receive the sanction of this court.

It is contended again by counsel for appellee that the rule requiring notice of special circumstances in order to the recovery of extraordinary damages does not apply in this case, because

American Express Co. v. Jennings

the gravamen of the declaration is that of neglect or breach of duty in the course of the general employment of appellant; the action being of tort, and not for a breach of contract. We cannot concur in this. Damages arising from merely negligent delay in transportation of freight by a common carrier are generally and correctly treated as arising *ex contractu*. The rule for their admeasurement is well established in our jurisprudence, and cannot be modified, and the damage recoverable largely increased, by the simple expedient of changing the form of the action. Especially must this be true in a jurisdiction that pays but little attention to the forms of pleadings, but looks to the substance of the cause. This court, in an action *ex delicto*, has held that the rule announced in *Hadley v. Baxendale* would be applicable in case of failure to carry and deliver freight in reasonable time, where such failure arose from the mere negligence of the carrier, but that wanton and gross neglect of their duties by common carriers, and reckless disregard of the rights of shippers, and willful refusal to deliver, if alleged in the declaration and sustained by the proof, would authorize a verdict not only for compensatory, but also for exemplary, damages. *Silver v. Kent*, 60 Miss. 124. This limitation of the general rule is eminently correct, but neither the averments of plaintiff's declaration, nor the facts in evidence, bring his case within it.

If upon another trial of this case it shall be developed that the Southern Express Company made a contract for through shipment, contracting for both itself and its connecting line, the American Express Company, special damages will not be allowed unless it shall appear that, before the articles were received by the Southern Express Company for shipment, it had notice of the special circumstances of plaintiff's situation, and of the great importance to him of prompt carriage and delivery. If it shall appear that the Southern Express Company contracted only for itself, and not for itself and connecting line, then special damages will not be allowed unless it shall appear that before the articles were received by defendant, the American Express Company, it had notice, at the place where it received the shipment, of the special circumstances of plaintiff's situation, and of the great importance to him of prompt carriage and delivery. Notice to defendant's agent at Scobey at the time of the shipment of the piston to the Adams Machine Company for repairs will not suffice.

Reversed and remanded.

NASHVILLE, C. & ST. L. RY. CO. *v.* FLAKE.

(Supreme Court of Tennessee, June 18, 1903.)

[88 S. W. Rep. 326.]

Carriers—Injuries to Passengers—Misconduct of Third Persons—Negligence.*—Where certain passengers boarded defendant's train, and, while under the influence of liquor, exploded dynamite sticks in the car, and on the platforms, and fired pistols, but the carrier's servants, though knowing or having an opportunity to know of such acts, neglected to take proper precautions to prevent injury to others until plaintiff, another passenger, was shot by the alleged accidental discharge of one of such weapons, the carrier was liable for the injury so sustained.

Error to Circuit Court, Henderson County; Levi S. Woods, Judge.

Action by James Flake, by his next friend, against the Nashville, Chattanooga & St. Louis Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

T. A. Lancaster, for plaintiff in error.

Barham & Davis and *M. F. Ozier*, for defendant in error.

BEARD, C. J. A boy 13 years of age, while riding on one of the passenger trains of the plaintiff in error on the afternoon of the 24th of December, 1903, while en route from Huron, a small station on the line of the railway, to Lexington, in this state, was shot. He was wounded by a pistol fired by a party whose name was unknown, and this suit was brought to recover damages for the injury thus received, upon the theory that the conditions existing upon that train, which either were known or should have been known to those in charge, were such as to have caused them reasonably to anticipate this result, and, failing to exercise proper diligence, the plaintiff in error was liable. There was a verdict and judgment in favor of the plaintiff, and the case has been brought into this court for review. A number of errors have been assigned, all of which save one are disposed of in a memorandum opinion which is not intended for publication. The one not there embraced is regarded as of sufficient importance for an opinion to be carried into our Reports.

The record shows that at Jackson, Tenn., the train in question was boarded by a number of persons then under the influence of strong drink. These parties carried upon the cars bottles of liquor, from which they freely drank as the train proceeded. They were boisterous in manner and speech, and by their conduct attracted the attention and gave considerable alarm to other passengers. They had possession of dynamite sticks, on which they placed caps. These, on being struck upon the floor, exploded. These explosions were as loud as pistol shots. While one or

*As to the duty of the carrier to protect its passengers against others, see foot-notes appended to *Illinois Cent. R. Co. v. Winslow* (Ky.), 14 R. R. R. 432, 37 Am. & Eng. R. Cas., N. S., 432.

Nashville, etc., Ry. Co. v. Flake

more of these explosions took place in the coach in which the defendant in error was riding, the others were produced upon the platform outside. Young Flake entered the coach, in which he was sitting at the time he received his wound, at Huron. He took his seat just back of the water cooler, with his face fronting in the direction the train was moving. This coach was immediately in the rear of the smoking car. In it were crowded many passengers, filling all the seats and occupying the aisle. The parties who have been referred to as boisterous, or at least some of them, came occasionally into this coach, elbowing their way down the aisle, and, after remaining for a few minutes, would retrace their steps, and on passing out they either stopped upon the platform or else would enter the smoking car. The passengers in this coach observed that they were under the influence of liquor. Loud and boisterous talking in the smoking car was heard. Much firing was done on the platform between the coach and the smoking car. This firing began soon after the train left Jackson, and continued at intervals until this boy was shot. Unquestionably, some of the explosions which occurred on this platform came from the use of dynamite sticks, but some were from the use of pistols in the hands of some of these parties. One of them made an effort to have a witness, whose testimony is in the record, shoot a negro, who, at one of the stations along the line of the road, rode for a short distance upon the steps of this smoking car while engaged talking to a friend on the platform, offering him a pistol for that purpose. The witness, however, declined the offer. Immediately after the firing of the shot that wounded young Flake, one of these rowdies, with a pistol in his hand, went out of the coach to the platform, and stated that his weapon had accidentally been discharged, and he had wounded a boy.

The employees in charge of the train testify that they saw no one with pistols, and heard no firing. They say that there were crowds collected at the stations along the railroad, consisting of whites and negroes, engaged in shooting firecrackers and otherwise making a noise as such crowds will do in anticipation of Christmas. They further testify that there was some boisterous conduct in the smoker, which, however, was promptly suppressed by the manager of trains, who happened to be on board at that time. They deny that they knew, save for the single incident just referred to, of any improper conduct committed by any one, either on the platform or in the coaches making up that train. The jury evidently credited those witnesses who testified so positively with regard to the shooting of pistols and other explosives on the platform, as well as to the boisterous conduct in the coach, and believed, where so many persons were aware of these things, that the railroad employees either knew, or by the slightest diligence might have been informed, of them. That the jury imputed the wound of this boy to the failure of those in control of the train to discharge their duty is evident from the

Patrick v. Missouri, etc., Ry. Co

verdict which was rendered. While it is true they could not foresee the woundings of the defendant in error, yet they should have anticipated that drunken ruffians armed with pistols, unless suppressed, would either accidentally or intentionally inflict injury upon their fellow passengers.

We think there is abundant evidence to support the verdict of the jury, and to indicate that they were inexcusably negligent in preserving order. The principle of law controlling in the case is that "wherever a carrier, through its agents or servants, knows, or has opportunity to know, of threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precaution, or to use proper means, to prevent or mitigate such injury, the carrier is liable." 5 Am. & Eng. Ency. of Law, p. 553.

This rule was applied in *Ferry Co. v. White*, 99 Tenn. 256, 41 S. W. 583. In that case the court quoted and approved a clause from the charge of Shipman, J., given to the jury in a suit involving the liability of a steamer and its owners for an injury sustained by one passenger from the violence of a fellow passenger. This clause was as follows: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might be reasonably anticipated, or naturally be expected to occur, in view of all the circumstances, and of the number and character of persons on board."

Public policy requires the strict enforcement of this rule. No relaxation of it should be indulged by the courts. The comfort and safety of passengers who commit themselves to a carrier depend upon it. The facts of the present case eminently call for its application.

We are satisfied no error was committed by the trial judge in his charge, embodying as it did this rule of liability, and his judgment is therefore affirmed, with costs.

PATRICK v. MISSOURI, K. & T. RY. CO.

(Court of Appeals of Indian Territory, Oct. 19, 1904.)

[88 S. W. Rep. 330.]

Carriers—Bill of Lading—Signature.*—Where a bill of lading containing a carrier's limited liability contract was delivered unsigned by the carrier's agent to the wife of the shipper, who was illiterate, and its contents were not made known to her, it was ineffective as a contract to limit the carrier's common-law liability.

Same—Pleadings—Amendment—Conformity to Proof.—Where a

*See foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504, where all the preceding authorities in this series are collected.

Patrick v. Missouri, etc., Ry. Co

complaint against a carrier for loss of goods as originally filed contained no statement concerning a pretended bill of lading, which was first disclosed on a motion made by defendant to have the complaint made more definite and certain, when it was inserted in the complaint by way of interlineation, it was proper for the court, on its appearing that the bill of lading had never been signed by the carrier's agent, to permit an amendment of the complaint to conform to the proof as authorized by Mansf. Dig. § 5080 (Ind. T. Ann. St. 1899, § 3285).

Appeal from the United States Court for the Central District of the Indian Territory, before Justice Wm. H. H. Clayton, June 6, 1901.

Action by W. G. Patrick against the Missouri, Kansas & Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

On August 3, 1900, the plaintiff filed with G. T. Ralls, United States commissioner, a complaint, and alleged that defendant, as a common carrier, received from the plaintiff at South Canadian, on September 22, 1899, "two certain boxes or packages for shipment, consigned to the plaintiff at Durant, Indian Territory, of the value of \$60.40, as shown by account hereto attached, marked 'Exhibit A,' and made a part of the complaint. Plaintiff says that 24 hours was a reasonable time for the delivery of the goods at Durant; that he had called for said goods at various times; that defendant had failed and refused to deliver the same, to his damage in the sum of \$60.40. Wherefore plaintiff asks judgment against the defendant for said sum and costs." Summons was issued, returnable September 3, 1900. On the same day the defendant filed its motion to require plaintiff to make his complaint more definite and certain, and to allege whether the contract under which the goods claimed by plaintiff were shipped was verbal or in writing, and, if in writing, that plaintiff be required to attach his original shipping contract to his complaint. Motion was sustained, and amendment made by interlineation as follows: "And said company made its bill of lading for said property, which is filed herewith as 'Exhibit B.'" And on the same day defendant filed its answer, and admits that it received from the plaintiff at South Canadian, Ind. T., on or about September 22, 1899, two boxes or packages for shipment, and admits that the same were consigned to the plaintiff at Durant, Ind. T., but denies that they were of the value of \$60.40, or other sum; denies that a reasonable time for the delivery of said goods at Durant would not exceed 24 hours; denies that the plaintiff had called for the same, or the defendant refused to deliver the same. The defendant, further answering, states that said boxes "were received by this defendant for shipment by virtue of a written contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this answer; that said contract was entered into on the 22d of September, 1899, between the plaintiff and the defendant, * * * it being

Patrick v. Missouri, etc., Ry. Co

provided in said contract that, in the event of any loss or damage thereto, the liability of the defendant railway company should be limited to the sum of five dollars per hundredweight; * * * that under the terms of the contract aforesaid the measure of damages, if any, in this case, should be five dollars per hundredweight." Defendant states that the weight of said two boxes was 150 pounds, that said written contract provided that any claim which the plaintiff might have or prefer against the defendant should be presented to some general officer or agent of said company within 30 days after the loss or damage had been sustained, and that defendant had a station agent at South Canadian and at Durant, Ind. T., to whom such claims might have been presented, but that plaintiff failed to present any such claim within said period of 30 days, and further states that the failure to receive the goods was not due to any negligence of the defendant, and was due to the negligence of the plaintiff, and asks judgment for its costs.

Said cause was tried by said United States commissioner on the 3d day of September, 1900, and verdict and judgment had for plaintiff for \$60.40, from which the defendant appealed to the United States court, Central District, at Atoka. On February 13, 1901, petition for change of venue was filed by defendant, and said cause was transferred to the United States court at South McAlester, Ind. T. On June 6, 1901, the same being a day of the regular May, 1901, term of said court, this cause came on for trial. The same was tried by a jury, and after the introduction of evidence the plaintiff was permitted to amend his complaint by adding the words, "which bill of lading was not signed," to which amendment the defendant at the time excepted; and thereupon the court instructed the jury to return a verdict for the plaintiff, and the jury returned the following verdict: "We the jury duly empaneled and sworn to try the issue in the above entitled cause, do find the issues in favor of the plaintiff and assess his damages at sixty and forty hundredths dollars. [Signed] William T. Thurman, Foreman."

On June 8, 1901, the defendant filed its motion for a new trial, and on the 10th day of June, 1901, "the court, having seen and heard said motion, and being well and truly advised in the premises, doth overrule the same, to which ruling of the court the defendant then and there in open court excepted." Whereupon judgment was rendered in favor of the plaintiff against the defendant for \$60.40, with interest thereon at the rate of 6 per cent. per annum from this date until paid, together with his costs. On the same day defendant was allowed 60 days in which to file his bill of exceptions, and that in the meantime execution under the judgment be suspended. Said bill of exceptions was filed with the clerk of said court on the 21st day of June, 1901, and on the 18th day of July, 1901, upon the application of the defendant, an appeal was granted to the United States Court of Appeals for the Indian Territory by William P. Freeman, clerk

Patrick v. Missouri, etc., Ry. Co

of the said United States Court of Appeals. On the 15th day of July, 1901, a supersedeas bond was executed by the defendant, and the case was thus appealed to this court.

Clifford L. Jackson, for appellant.

Fortune & Fort and *L. D. Horton*, for appellee.

TOWNSEND, J. (after stating the facts). The appellant in this case (the defendant below) has filed four specifications of error, which are as follows: (1) The court below erred in refusing to instruct the jury to return a verdict for the defendant as requested. (2) The court below erred in refusing to give the following instructions asked by the defendant: "The court instructs the jury that even if you should find the defendant liable in this case under the other instructions of the court, then you are further instructed that in assessing the damages of the plaintiff you cannot fix a higher valuation upon the goods in question than at the rate of five dollars per hundredweight." (3) The court erred in instructing the jury as follows: "You are instructed to find your verdict for the plaintiff, and to assess his damages at the sum of \$60.40." (4) The court erred in overruling defendant's motion for a new trial.

It is hardly necessary to notice or discuss any other than the second specification of error, the defendant contending "that the contract governing the shipment of goods in controversy was in writing, and fairly limited the value of the goods, and the jury should have been so instructed, and should not have been instructed to assess the damages of the plaintiff below at the full amount sued for, and because of the error of the trial court in these respects the motion for a new trial should have been granted." The question is thus fairly presented as to whether the paper which was attached to the plaintiff's complaint on motion of the defendant, and subsequently set forth as an exhibit to the answer of the defendant, constituted a bill of lading under the law. The appellant in his brief says, "This bill of lading was not a bill of lading in accordance with the technical commercial law, in that the agent of the carrier failed to sign it." The only effect that could be attached to the failure of the agent to sign this bill of lading would be that it would not be negotiable on the market, in accordance with the mercantile usage; but the failure of the agent to attach his signature could not even have had that effect in this instance, because in the bill of lading was a stipulation as follows: "Not negotiable unless shipment be consigned to shipper's order." Is this statement correct? This paper purports in the first instance to be a receipt for the two boxes of household goods. Is a receipt that is unsigned a valid receipt? It also purports to contain a stipulation of a special contract; but when the same has not been signed by the appellant's agent, and there is no evidence that the plaintiff has ever assented to the special stipulation thus set up, is it such a contract as would bind either the appellant or the appellee? Mattie

Patrick v. Missouri, etc., Ry. Co

Patrick, the wife of the appellee, in her disposition introduced in evidence, as shown by the bill of exceptions, states as follows: "The porter took the goods out of the wagon and put them on the platform of the depot at South Canadian, and afterward he gave me a bill of lading. I asked the agent to give me a bill of lading. When I first asked him, he said it was no use; that the goods would come on the local behind me. I insisted that he give me a bill of lading, which he did, and I afterward delivered the same to my husband. * * * I cannot read or write, but the paper which the agent gave me as a bill of lading was the one I turned over to Mr. Patrick. * * * The agent did not read the bill of lading to me nor explain its contents to me, and failed to put the war revenue on it, but afterwards called me back and put the revenue stamp on it."

It thus appears, if the contention of the appellant is to be sustained, that this paper, which purports to be a receipt, and also containing a special contract, though not signed by the appellant's agent, and delivered to the agent of the shipper, who could not read or write, to whom the contents were not known, is a bill of lading, and limits the common-law liability of the appellant. Hutchinson on Carriers (2d Ed.) § 120, in defining a bill of lading, says: "These contracts assume somewhat different forms, and are known by different names, according as they may be with carriers by water or carriers by land. Those with the former are called 'bills of lading,' while those with land carriers are commonly called 'receipts.' They are, however, the same in effect, and are intended merely to evidence the true intent of the transaction between the parties. * * * They must be signed by the carrier or his authorized agent to bind him, and must be accepted by the shipper. And any contract with the carrier having these characteristics is entitled to the effect of a bill of lading, no matter how informally it may be drawn." In *The Tongoy* (D. C.) 55 Fed. 329, a bill of lading is defined as follows: "Now, a bill of lading is a written acknowledgment, signed by the master, that he has received the goods therein described from the shippers, to be transported on the terms therein expressed. It is a receipt for the quantity of goods shipped, and a promise to transport and deliver them as therein stipulated." 4 Am. & Eng. Enc. of Law says: "A bill of lading must be signed by or on behalf of the party undertaking the carriage, but need not be, and generally is not, signed by the party shipping"—citing *Porter on Bills of Lading*. "A bill of lading is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order, on board of his ship or vessel therein named, at the place therein mentioned, certain goods therein specified," etc. *Rapalje & Mack's Digest of Railway Law*, vol. 1, p. 601, citing *Union R. & Transp. Co. v. Yeager*, 34 Ind. 1. In the case of *The Delaware*, Justice Clifford, in delivering the opinion of the court, says: "Different definitions of the commercial instrument called

Patrick v. Missouri, etc., Ry. Co

'the bill of lading' have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated." 81 U. S. 600, 20 L. Ed. 779. "Bills of lading are usually on printed forms and signed by the carrier or his agent." Elliott on Railroads, § 1417, vol. 4, p. 2200.

In *Montague et al. v. The Henry B. Hyde* (D. C.) 82 Fed. 682, the court says: "A bill of lading is an instrument well known to the commercial law, and, according to mercantile usage, is signed only by the master of the ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered, it constitutes not only a formal acknowledgment of the receipt of the goods therein described, but also the contract for the carriage of such goods, and defines the extent of the obligations assumed by the carrier. *The Delaware*, 14 Wall. 579, 20 L. Ed. 779. In my opinion, the rule which governs the point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract, in the absence of any statute to the contrary, may be contained in a bill of lading signed by the carrier alone; and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the absence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms and conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading; and this I understand to be the rule sustained by the Supreme Court of the United States in the case of *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872, and is supported by the following well-considered cases: *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Dorr v. Navigation Co.*, 11 N. Y. 485, 62 Am. Dec. 125; *Railroad Co.*

Patrick v. Missouri, etc., Ry. Co

v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; *McMillan v. Railroad Co.*, 16 Mich. 79, 93 Am. Dec. 208. In the case last cited, Mr. Justice Cooley, speaking for the court, said: 'Bills of lading are signed by the carrier only; and, where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing.' " Am. & Eng. Enc. of Law, vol. 4 (2d Ed.) p. 514: "A bill of lading, though signed, can have no effect until delivery."

It thus appears that, if a bill of lading is issued by a common carrier, it must be signed by it, in order to make the same a binding contract between itself and the shipper. The appellant has cited numerous authorities to establish the proposition that a common carrier can limit its liability without any written bill of lading. There is no question but that a verbal contract can be made, and the only serious objection to it is the difficulty of proving the same, in the event of controversy between the shipper and the carrier. When a common carrier seeks to limit its common-law liability, the law interposes no objection, but such a contract must be clearly established.

"In the absence of a statute to the contrary, no particular form or mode is required to constitute such a contract as will be binding upon the carrier's employers. * * * Whenever, however, it appears that what has been proposed on one side has been accepted by the other, a contract is proven which will be mutually binding, whether the proposition is made in the form of notice or in any other manner. But the proof of assent to the terms proposed by the carrier must be clear in such a case, for the law, having imposed an important duty upon him, upon grounds of public policy, will not permit him to divest himself of its responsibilities and throw the loss upon his employer, when the proof that the latter has so agreed is doubtful. But it is not required that such proof, if otherwise satisfactory, shall be written. A verbal contract is as obligatory as a written one when established. The only difference is in the manner and in the degree of certainty of the proof." Hutchinson on Carriers (2d Ed.) § 242.

"A special contract limiting the liability of the carrier as an insurer may be verbal as well as written, unless the statute requires it to be in writing. It may be more difficult to establish a specific parol contract, but, when once clearly established, it is as obligatory as a written one. Of course, where there is a complete written contract, it cannot, as a rule, be contradicted or varied by oral evidence, and all verbal agreements made prior to the execution of the bill of lading are usually merged therein; but, as we have seen, there are cases in which, after the carrier has once accepted and shipped the goods under an unconditional

Patrick v. Missouri, etc., Ry. Co

parol contract, it cannot afterwards limit its liability by a receipt or bill of lading; and so, on the other hand, after a receipt or bill of lading has been executed, a new contract may doubtless be made in parol upon a new consideration, whereby the liability of the carrier may be properly limited or other changes made in the terms of the original contract." Elliott on Railroads, vol. 4, § 1503.

The appellant has also introduced authorities to establish the proposition that the acceptance of a bill of lading by a shipper, without any objection, when the same is issued by the carrier, binds the shipper to all limitations of liability embraced in said bill of lading. "According to the English cases and the clear preponderance of authority in the United States, if a bill of lading is accepted by the shipper without objection, he is ordinarily—i. e., in the absence of fraud, accident, or mistake—presumed to have knowledge of and to have assented to its terms, and he cannot afterwards be heard to say that he did not read it, but will be bound thereby. And the general rule is that prior negotiations cannot be resorted to for the purpose of varying the terms of the instrument." Am. & Eng. Enc. of Law, vol. 4 (2d Ed.) pp. 516, 517.

But the paper issued and denominated a bill of lading in the case at bar was never signed by the carrier, and by reason of that fact it was not a bill of lading, and, consequently, pretended limitations of liability stated therein were not binding on the appellee, and none of its provisions were binding on either the carrier or the shipper. Therefore, there is no evidence that any verbal or written contract was made between the parties, limiting the common-law liability of the carrier. The suit, as originally instituted, contained no statement about this pretended bill of lading. It was first disclosed on the granting of a motion by the United States commissioner, made by the appellant, to make the complaint more definite and certain, and was inserted in the complaint by way of interlineation. The appellant answered, insisting that its liability had been limited, but, when the case was tried in the district court, the discovery was made that the pretended bill of lading had never been signed, and the court allowed an amendment to the complaint to make same correspond to the proof in the case, which he was authorized to do by section 5080, Mansf. Dig. (Ind T. Ann. St. 1899, § 3285), as follows: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." This simply placed the suit where it was when instituted before the commissioner, and, before the error was committed by the commissioner, requiring the plaintiff to

Minahan v. Grand Trunk Western Ry. Co

produce the pretended bill of lading. The appellant admitting that it had received the goods and had failed to deliver the same, the court very properly directed the jury to return a verdict for the plaintiff.

We think the judgment of the court below was correct, and it is therefore affirmed.

RAYMOND, C. J., and GILL, J., concur.

MINAHAN v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit, June 15, 1905.)

[138 Fed. Rep. 37.]

Federal Courts—Bill of Exceptions—Settlement—Time.—A bill of exceptions in a case tried in a federal court may be settled at any time during the term, or thereafter until the end of the term during which judgment is rendered.

Same—Extension of Time.—An order extending the time to settle a bill of exceptions, made during the pendency of the term at which the cause was tried, to a date later than the end of that term, of itself operated to prolong the control of the court over the cause, and justified the settlement of the bill at a later date.

Trial—Peremptory Instructions—Joint Requests.—Where, in an action in which the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff, and the court permitted such requests to be filed, and assured counsel that he should have the benefit of them, such practice did not amount to a submission of the issues of fact to the court so that plaintiff was precluded from objecting to an adverse finding thereon.

Carriers—Injuries to Passengers—Presumption of Negligence.—Injuries to a passenger by derailment of the car in which he was riding, while passing over a switch, created a presumption of negligence on the part of the carrier.

Trial—Direction of Verdict—Conflicting Evidence.*—A trial judge in a federal court is not entitled, on his own view of the evidence, to direct a verdict, where there is a positive conflict in the evidence on a material issue.

Same—Question for Jury.—In an action for injuries to a passenger by derailment of the car in which he was riding, as it passed over a defective switch, conflicting evidence as to the cause of the defect held to present a question for the jury.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Dickinson, Stevenson, Cullen, Warren & Butzel (Maybury,

*For the authorities in this series on the presumption of negligence arising from the fact that a passenger is injured, see foot-notes appended to *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-note appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *Jones v. United Rys. & Elec. Co. of Baltimore* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631.

Minahan v. Grand Trunk Western Ry. Co

Lucking, Emmons & Helfman, of counsel), for plaintiff in error.
H. Geer, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The case brought up by this writ of error is an action instituted in the court below by the plaintiff in error to recover damages for personal injuries sustained by him in consequence, as he alleges, of the negligence of the defendant while he was a passenger on a car of defendant's passenger train, whereby the car was thrown from its track against an engine standing on a side track at or near Millets Station, a few miles west of Lansing, Mich., on the night of April 5, 1902. The defendant pleaded the general issue, which, under the Michigan statute relating to pleadings in actions at law, is equivalent to a plea of not guilty. The issue was tried before a jury, and at the conclusion of the evidence adduced by the respective parties the court, at the request of the defendant, instructed the jury to return a verdict for the defendant. No question arises upon the pleadings. There are 53 rulings of the court assigned as errors. But as we are of opinion that the court erred in taking the case from the jury by its peremptory instruction, we shall pass all other questions, and, after attending to certain objections of the defendant in error, proceed to a statement of the reasons which lead to our conclusion upon the propriety of the general instruction given by the court. To do this, we must needs make a more particular statement of the case.

The plaintiff had taken a ticket at South Bend, Ind., for a passage over the defendant's road to Detroit. There were seven cars in front of the one on which the plaintiff was riding, and one, a sleeper, behind. The train left South Bend at 11:30 p. m., and at 3:30 in the morning was passing through Millets Station at a speed of 45 miles an hour. Some time before that a long freight train drawn by two engines, coming from the east, had passed off the main track, and was standing on a side track on the south side of the main track and parallel therewith, awaiting the passage of the passenger train, No. 6, on which the plaintiff was riding. There was a switch at the west end of the side track, and some distance west of the station house, leading into the main track, and the switch was adjusted so as to leave the main track clear for the passage through of the passenger train. This switch was of parallel rails, which at the movable end were thin, running to a point, and lying against the side of the rail when closed. The engine of the passenger train and seven cars passed over the switch safely. The forward truck of the plaintiff's car also kept the main track, but the switch apparently opened before the rear truck reached it, and the rear end of the car was carried off to the right, and the car thrown with great violence against the engine standing in the front end of the freight train. One of the passengers in the car was killed; several were seriously injured, among them the plaintiff, who was so grievously hurt that he is crippled for life. The cause of the

Minahan v. Grand Trunk Western Ry. Co

accident was the dislocation of the switch bar at the joint where its two parts are united, whereby the part (which for convenience is called here part 2) carrying at their proper distance apart the front or movable ends of the switch rails was left unattached to the part (called part 1) coming from the switch stand, and the forward end of the switch was left floating, i. e., without any lateral fastening. Apparently, also, the concussion and jar of the passenger train had to do with the dislocation of the switch bars and the lateral movement of the fore end of the switch whereby it became opened. Until the afternoon of the day before the accident the switch stand had stood upon the south side of the tracks, but on that afternoon it was moved over to the north side of the tracks to make way for the removal of the station house to the former site of the switch stand. And in transferring the switch stand to the north side it became necessary to detach part 2 of the switch bar from the switch rails and reverse its position, end for end, and again securing it to the rails of the switch. Part 2 was also detached from part 1 at the joint between them. Part 1 was carried over the switch stand; the two long ties on the projection of which the stand rested were slid under the rails to the north, to form the projection for the stand there. The stand was relocated, parts 1 and 2 connected up, and the switch made to operate. This was finished at the close of the day's work. We have said that parts 1 and 2 were "connected up." But as the controversy is centered at this point, it is necessary to describe in detail the mode of this connection. This end of part 1 is flat and rounded at the extremity, near which a perpendicular hole is made in such wise that a loop is formed around the pin to be inserted in the hole, which loop is of a nearly even thickness around the sides and fore end of the bar. On the connecting end of part 2 a pin is secured perpendicularly, which enters the hole in the end of part 1. Then, in order to hold the end of part 1 down on the pin of part 2, a clip is riveted upon part 2 further back than the pin, is carried up the thickness of the end of part 1, and then carried parallel to part 2 part way over the rim or loop on the end of part 1. When the parts are formed in this manner, the only way of detaching them is by bending the free end of the clip upward and backward far enough to make space for lifting the loop off the pin. Some of the witnesses testified that this was the form of the parts of this switch bar. When these parts of the bar were first seen after the accident, the clip was thus turned up out of its normal place. Another form of making the parts of the bar is to carry out a projection, or tongue, on the end of part 1 beyond the pinhole. Then the clip on part 2 is made shorter at the free end so as to rest on the tongue only. In this form the parts may be readily disengaged by turning them at right angles to each other, thus carrying the tongue from under the clip. This is the form in which some other of the witnesses testify this switch bar was made. If this was so, there was no need of med-

in v. Grand Trunk Western Ry. Co

if the sectionman understood his business. He was required to work expeditiously in order to get in order for the passage of trains, and he had not familiarity with switches. He had two men to help him, but they belonged to another branch of the service. He testified that after the accident he tried to bend the clip back to its place by hammering it with a fish plate, and, not succeeding completely with this, the superintendent of the tracks who had come to the place hammered it back to place with an iron maul. The bar was in its proper place, and used two days after.

At the trial the defendant produced before the court parts of a switch bar which some of its witnesses claimed to be the identical switch bar in question which was used two days after the accident and preserved for the purpose. This switch bar had a projection on the end which corresponded with part 2. Several witnesses for the plaintiff testified that the bar on the morning after the accident was not the same, but of engineering and metallurgy from the plaintiff. The witness testified that the clip bore no signs of having been bent back to place, as it would have done if it had been the original bar. We cannot further prolong this case.

Questions are raised by counsel for defendant which must first be settled before the merits are con-

sidered. It was held that from lapse of time after the trial the court had no authority to settle the bill of exceptions, and that the verdict was rendered void by mere nullity. The verdict was rendered void when then pending expired on the first Tuesday following. No judgment was rendered during the term. On October 19, 1903, the court ordered that the bill of exceptions should be extended until the next session. On successive orders the time was further extended until the bill was settled, July 18, 1904, when the court entered judgment on the verdict for the plaintiff. Mr. Meddaugh, the attorney of record for the defendant, died on December 20th, and the defendant named no successor. On April 20th counsel for plaintiff moved for judgment on exceptions on Geer & Williams, who were named as counsel for defendant. The court refused to take any action on account of Mr. Meddaugh's death. On June 4th the plaintiff gave notice to the defendant's new attorney, as provided by a Michigan statute, which was ignored by defendant, and on the 8th of June an order which, after reciting the notice given, directed that the cause be set for trial on the 11th of that month. The court then had been served on Geer & Williams.

Minahan v. Grand Trunk Western Ry. Co

should not be settled. On that day Geer & Williams and F. E. Rankin "appearing specially," as the record states, and, on an affidavit of Mr. Rankin stating the death of the attorney of record and that the extensions of time for settling a bill were made *ex parte*, moved that the order to show cause be dismissed. The motion was denied, and, on request of counsel for defendant, the time for settling the bill was extended one week, at the end of which time it was settled, as before stated. The contention for defendant is that the time wherein a bill of exceptions could be settled expired at the end of the term during which the cause was tried. But this is not a valid objection. By the lapse of the term without the rendition of a judgment, the cause remained open and in all things subject to the power of the court. Until the judgment was entered, the court had power to extend the time for settling a bill of exceptions, and, if the reasons for it were sufficient, it would be not only proper, but due to the party that it should be done. It is true that it has sometimes been said in judicial opinions that the bill must be settled during the term at which the cause was tried. But doubtless this was so said because in the usual practice of the courts the judgment is entered before the lapse of the term, and the expression referred to was made in contemplation of the ordinary course, and so was an inexact statement of the rule as a universal one. In like manner a great number of decisions can be found wherein it is said that the power of the court over a judgment is at an end at the expiration of the term at which it was rendered. But this, while true as a general rule, has an exception, which is of frequent occurrence, when the cause remains open for some further action contemplated by the court. It is accordingly the established rule that a bill of exceptions may be settled at any time during the term at which the cause is tried, and thereafter, if judgment is deferred, until the end of the term during which it is rendered. And in *Ward v. Cockran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, it was held that an order extending time for settling the bill made during the pendency of the term at which the cause was tried to a date later than the end of that term of itself had the effect to prolong the control of the court over the cause and justify the settlement of the bill at a later date. This view of the subject makes it unnecessary to consider what effect the death of the attorney of record in December, after the time had been extended beyond the trial term, would have upon the validity of notices given to defendant's counsel. For it is not contended that the notice given in June to appoint another attorney was invalid, or that the failure of the defendant to make such appointment was not sufficient to give ground for the action of the court in making the order on defendant to show cause, if the lapse of time had not deprived the court of power to make it.

The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the

Minahan v. Grand Trunk Western Ry. Co

within the intendment of Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570]. The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the party wishes to obtain the opinion of the court upon the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate instructions be given them to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell v. Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of the facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests.

Coming to the main question, the contention of the plaintiff was that, when the stand was moved in the afternoon, the sectionman, in order to detach parts 1 and 2 of the switch bar, pried up the end of the clip on part 2 so as to let the pin drop out of the hole in part 1; and that, when he had put the parts together again on the other side of the track, he neglected to bring the end of the clip back to its place. The defendant's contention was that the sectionman took the members of the bar apart and put them together again without disturbing the clip, and that the clip

Man v. Grand Trunk Western Ry. Co

ised by some unknown person out of malice
d company, or that in some other unknown
raised without any fault of defendant. It is
ie plaintiff was at fault, or disputed that, as
resumption of negligence against the defend-
proof of the accident, and the absence of fault
plaintiff. That such is the law is well settled.
f the defendant's sectionman and his helpers
ted and were given full credit, it might, and
e found that the defendant was exculpated.

was subject to some criticism, and not alto-
ther in itself or with the uncontroverted facts;
s it was by other unimpeached witnesses upon
ermination of such facts depended upon the
vitnesses, and nothing is more clearly settled
e province of the jury. The court below, in
efore charging the jury, justifies the proposed
ie ground that several unimpeached witnesses

the switch was left that afternoon the clip
oper position, and that this fact, thus proved,
endant from any duty of further showing how
ed. But the learned judge stated that it was
clip was sufficient for its purpose, and that
accident attributable to the switch so long as
in its proper position. The undisputed facts
itch had, up to the time when it was changed,

and was then in proper condition, and that
s thereafter it was found with the clip raised
e bar separated. The disaster coming so soon,
ion of the inquirer is directed to the fact that
opened the day before. If it was closed again,
pened? No one is charged with a malicious
d prompt to such a deed. Counsel for defend-
n much warmth against the imputation that
he company had for the purposes of the suit

switch bar for the genuine (a grossly scan-
it is true, if the fact was so), and claimed
on against such conduct was so strong that
plaintiff's witnesses in that regard ought not
t the jury might well have thought that a still
on existed against the imputation that some
rsons, with no apparent motive at all, might
which, if its purpose should be effected, would
e lives and safety of innocent persons. The
ie case were such that the moral probabilities
ablished facts had a very potent influence in
o the truth. This species of evidence is often
nan the testimony of witnesses.

ne learned judge said:

r that the undefaceable impression left upon

Minahan v. Grand Trunk Western Ry. Co

my mind by this testimony is that the explanation offered by the railway company here in this case shows such a correct demonstration to my mind of immunity from liability that if the case were submitted to you for your decision upon the facts, and you should find contrary to the result which I will announce, I should deem it my duty, in the exercise of sound judicial discretion, to set that verdict aside. That being the duty forced upon me by the rules of law, I am not only authorized, but required to give to the facts proven judicially the same force and effect as if your verdict should be for the defendant."

If, indeed, the case for the plaintiff was so feeble that it would be the imperative duty of the court to set aside a verdict based upon it, we should have no doubt that the court might end the case by a peremptory instruction to find for the defendant. The court might, upon motion, in the exercise of "sound judicial discretion" upon its view that the clear preponderance of the evidence was with the defendant, set aside a verdict for the plaintiff and order a new trial. But the court cannot balance the evidence when it is conflicting, and then compel the jury to find a verdict according to the court's estimate of the relative weight of the evidence for the respective parties. Such a doctrine would efface the line of demarcation between the provinces of the court and jury.

Certain expressions used by the Justices in delivering the opinion of the Supreme Court are often laid hold of by counsel in cases in the federal courts as authority for some such doctrine as that of the court below. Indeed, in this court, and we have no doubt the same thing is true in the experience of all the federal appellate courts, come frequent repetitions of cases where opposite counsel contend for distinctly opposite doctrines in respect to the authority of the trial judge to take the determination of questions of fact from the jury, and in support of their respective contentions an equally formidable list of decisions is cited; on the one hand, where language has been used almost, if not quite, as broad as that of the trial judge in the present instance; and, on the other hand, where that court has said that if there be any substantial testimony bearing upon an issue of fact to which the jury might, in the proper exercise of their rightful authority, give credit, the court is not justified in withdrawing the issue from the jury and deciding it upon its own estimate of the preponderance of the evidence. Undoubtedly, it is distinctly settled that a mere scintilla, a spark, which arrests attention, and then from mere lack of vitality fades away, is not sufficient to warrant the submission of an issue of fact to a jury, when the scintilla is all that is developed by the party having the burden of proof. Such a showing has no substance, has not the quality of proof, and the judge may lawfully say so to the jury. And it must be admitted that the Supreme Court has gone a step farther than this, and assigned to the province of the court the right to direct the jury in those cases standing

1 *v. Grand Trunk Western Ry. Co*

there is a mere scintilla and those where evidence, standing in a borderland, so to idence is so vague, indefinite, or inconse- rnish a reasonable foundation on which a There are numerous cases in the Supreme l that the judge may direct the verdict when ch conclusive character that the court, "in and judicial discretion, would be compelled returned in opposition to it." In the case indoubtedly be the imperative duty of the ict aside, and the refusal to do so would be tice. The judge is bound to see that each gal justice, which could not be if one party gment without proving his cause of action, owed to defeat a proven cause of action a defense. In other cases it is said the ed in which the judge may direct the verdict xerate opinion, there is no excuse for a ver- one party."

irst volume of his work on Evidence, § 49, precision thus states the fundamental rules of fact:

without the aid of a jury, the question of evidence, strictly speaking, can seldom be er be the ground of objection, the evidence necessity be read or heard by the judge, in ts character and value. In such cases, the ct, is upon the sufficiency and weight of the ls by jury, it is the province of the presiding ll questions on the admissibility of evidence as to instruct them in the rules of law by ighed. Whether there be any evidence or the judge; whether it is sufficient evidence : jury."

with this statement is the language of Mr. nprovement Company *v. Munson*, 14 Wall. 367, one of the leading cases generally cited llows:

held that if there was what is called a in support of a case the judge was bound ; but recent decisions of high authority have easonable rule—that in every case, before to the jury, there is a preliminary question whether there is literally no evidence, but upon which a jury can properly proceed to e party producing it, upon whom the onus

uage of Mr. Justice Miller in *Pleasants v. 22 L. Ed. 780*, another case often cited, nprovement Co. *v. Munson* and other cases,

Minahan v. Grand Trunk Western Ry. Co

he states the rule with more precision by a distinct exclusion, thus:

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether on all the evidence the preponderating weight is in his favor—that is the business of the jury—but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial"—and makes the matter clear.

We think the whole subject may be shortly summed up by starting with the incontestable datum that the Supreme Court has never intended to propound and perpetuate two inconsistent rules for the guidance of the trial judge. It has by distinct and definite rulings declared that, if there is any substantial evidence bearing upon the issue to which the jury might in the proper exercise of its function give credit, the court cannot rightfully direct the jury to find in opposition to such evidence. Among the many cases to this effect are: *Jones v. East Tenn. Ry.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478; *Washington, etc., Railroad v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Richmond & Danville Railroad v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Gardner v. Michigan Central R. Co.*, 150 U. S. 361, 14 Sup. Ct. 140, 37 L. Ed. 1107.

If this proposition is established, it follows that the more general language used by the court in other cases should be construed consistently with the definitely stated rule. If it be urged that the argument might be conversely stated, and that the last-mentioned cases might be taken as stating the rule and the former be construed consistently with the latter, the answer is that the former are explicit and definite, and cannot be reconciled with the rule which the latter are supposed to authorize. We are not aware of any case where the Supreme Court has by actual decision declared that the trial judge may, upon his own view, direct the verdict, where there is a positive conflict in the evidence upon an issue material to the controversy. And by "evidence" we mean something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of "proof" or having fitness to induce conviction. Such a case was *Riley v. Louisville & N. R. Co. (C. C. A.)* 133 Fed. 904, one of the cases on which the defendant relies. The testimony upon which the plaintiff relied in that case to prove the negligence of the railroad company in maintaining the switch in that form consisted of his own opinion and that of another employee that the ballasting under the switch should have been brought up to the ground level of the top of the ties. There

. Louisiana Western R. Co

evidence as to what was the customary
ing switches, which was to build them
on under them, and no question but that
s constructed in that form. If that was
e witnesses that in their opinion another
l not bear upon the real issue, which was
in the form in which such switches were
evidence led to no consequence affecting
at the court below had properly directed
it. These facts which are stated in the
der construction upon the previous lan-
which it was said that, if the case was
were rendered for defendant, the court,
nd judicial discretion, would have been
court did not err in directing the verdict.
e was *Randall v. B. & O. R. Co.*, 109 U.
7 L. Ed. 1003, cited as authority for the

This subject has been discussed in for-
rt, especially in that delivered by Judge
tc., *R. Co. v. Lowery*, 74 Fed. 643, 20 C.
lusions there reached were confirmed by
n delivered by Mr. Justice Harlan in
Co. v. Randolph, 78 Fed. 754, 24 C. C.
ions were in substance those which we
our judgment sound. But the frequency
s court of the question involved has in-
v the subject and restate our convictions
erning it. If we misinterpret the rulings
ve shall, of course, be glad to be set right
opportunity shall occur.

judgment must be reversed, with costs,
ed.

LOUISIANA WESTERN R. Co.

isiana, Jan. 30, 1905, on Rehearing, June
20, 1905.)

[38 So. Rep. 859.]

rsonal injury was the cause of action.

e questions are mainly of facts.

—**Conditions at Depot.**—Whether the rate
usual on the night of the accident, the extent
passageway, the place of the accident at the
pot, whether sufficient or not, are questions

testimony is conflicting The jury observed
1 while testifying. They must have been
and depot grounds. Some weight must be

Harvey v. Louisiana Western R. Co

Passageway from Depot to Train—Care Due Express Agent.*—The railroad company owed it to the employees of the express company to furnish a reasonably safe passageway from the depot to the train.

Depots—Speed of Trains.—A railroad train approaching its depot in a large municipality should moderate its speed.

Speed of Trains—Evidence.†—Witnesses who notice that the speed is unusually fast on approaching a depot are not discredited by the fact that they are not familiar with the management of a railroad under way.

Monroe, J., dissenting.

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Conrad De Baillon, Judge.

Action by Emmie Harvey against the Louisiana Western Railroad Company. Judgment for plaintiff, and defendant appeals. Modified.

Laurent Dupre and Denegre & Blair (Farrar, Jonas & Kruttschnitt, of counsel), for appellant.

Medlenka & Taylor (Carleton Hunt, of counsel), for appellee.

BREAUX, C. J. This suit was instituted by plaintiff to recover damages in the sum of \$10,000, arising from an accident in which her husband, W. T. Harvey, lost his life. Originally plaintiff brought suit for \$25,000 damages. The jury rendered a verdict for the amount claimed. A remittitur of \$15,000 was entered. The judge of the district court after the remittitur granted a new trial. On the second trial a verdict was returned for plaintiff for the sum of \$10,000, amount asked by plaintiff.

From this judgment defendant prosecutes this appeal.

The deceased husband of plaintiff was a night expressman employed by the Wells-Fargo Express company on the night of February 9, 1903, at Crowley.

There is no reason to infer that he (deceased) was lacking in experience as an expressman, nor that he was not familiar with the location, the track, or the movements of the railroad. On meeting the train with his truck, he was required by the duty incumbent upon him to deliver his packages or to receive the freight consigned to his company from the train and put it on his truck. On the night in question he left his home about the usual hour, and went to the depot to meet the train coming from New Orleans and going west. The train was late. As

*For the authorities in this series on the subject of the relation of express agents and messengers to railroad companies, see foot-note appended to *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 14 R. R. 227, 37 Am. & Eng. R. Cas., N. S., 227.

†As to what evidence is admissible to show the speed of trains or cars, see foot-notes appended to *Norfolk & W. Ry. Co. v. Briggs* (Va.), 13 R. R. 201, 36 Am. & Eng. R. Cas., N. S., 201, where all the preceding authorities in this series are collected or referred to; foot-note appended to *Gregory v. Wabash R. Co.* (Iowa), 15 R. R. 457, 38 Am. & Eng. R. Cas., N. S., 457.

Harvey v. Louisiana Western R. Co

was nearing the depot, he pulled his truck alongside and continued to walk, at the same time pulling the truck in the westerly direction in order to arrive in time at the place where his packages would be received or where he would be required to alight. This truck measured four feet wide by ten feet high. While thus going on his way, he pulled the truck onto the track, or so near that it was struck by the front part of the locomotive or pilot beam of the train, and thrown some distance; he thus hurled it (the truck) struck him a hard blow on the right side of the body, crushed in his ribs, and fractured his spine, which resulted in his death a few hours afterward. The truck was shattered to pieces. In his suffering condition after the accident he was, we infer, unable to give any account of the accident and gave none.

The first charge in her petition is that the adjacent grounds to the left of and along the track—that is, between its track and the depot—were dug out, the surface lowered, and that it remained in that condition for a number of weeks, thus reducing the width of the way to a dangerous degree.

The second charge of plaintiff is that one of defendant's employees placed a truck loaded with baggage at the end of the depot, and left insufficient space between the said baggage and the railroad company's track for the late expressman to pass with his truck, and that in attempting to pass he was forced to avoid pulling the truck to and on the track. The insufficiency of light at and about the depot is another cause of the accident.

The speed of the train is adverted upon as another cause of the accident.

The ordinance of the municipality of Crowley limits the speed of the train to ten miles an hour. The engineer, it is urged by the plaintiff, was not in command of the train in hand. It is said by witnesses for plaintiff that the train ran a number of feet beyond the station before the engineer made the usual stop. Plaintiff also seeks to account for the accident by the statement that on the night of the accident the locomotive passed the water tank without stopping to fill its water tank, and that it came into the depot ground sooner than it otherwise would have done. These are the grounds which, according to plaintiff, constitute the fault and negligence of the railroad company. Defendant company, on the other hand, says that the accident was not due to fault or negligence on the part of the railroad company, and that the late Harvey was heedless and negligent in driving his truck, as he did, too near the track, on which he must have known the train behind him was coming and was about to strike him.

The facts of the accident requires our special attention. The north features in that direction which do not seem to be the fault of either plaintiff or defendant; such as that the north side of the track, and extends from Parker to Avenue F west; that the main line of the rail-

Harvey v. Louisiana Western R. Co

road passes in front; that there is a platform at about 40 feet from the east end of the depot, and at right angles to this platform that there is a small platform for unloading; that there were two trucks on the passage—one stationary, left there by some person unknown, and the other pulled by the deceased at the moment of the accident.

The closely contested case leaves only a few uncontested facts regarding the locality and the appliances provided for the workmen.

The disputed facts are the rate of speed at which the train was running; whether the bells were struck and the usual warning given; the place at which the late expressman met with the accident; the light, or rather want of light; the obstruction at the place of the accident; the excavation in front of the depot, which the company had made; the rate of speed of the train after it came within the corporate limits; passageway over which the deceased was pulling his truck; the stopping place of the train, and the place to which it ran on the fatal night to Harvey; and the duties of a night expressman.

With reference to the warning, there is testimony of witnesses for defendant that at the whistling post the steam was shut off and the usual signal given; the speed was reduced, and that the train came into Crowley at the usual rate of speed; that the engine and train were under perfect control; that it stopped at the usual place—that is, about the west end of the freight depot. The train had a bright light—acetylene light. The engineer testified that he saw a man pulling a truck right beside the track at a distance of about 70 feet ahead of the engine, near the freight depot, and about 50 feet west of the negro waiting room. He (the expressman) was on the passageway between the track and the depot.

Morgan, a witness for defendant, employee of the Wells-Fargo Express Company, testified that the late express man was "right alongside of the railroad track, by the baggage truck"; that is, when the train was coming in.

This truck, we are informed by other testimony, was there loaded for train No. 8, going east, which was late.

Another of defendant's witnesses (Haley) testified that the stationary truck to which we have before referred as being on the passageway near the unloading platform was about 12 or 14 feet from Harvey when he was picked up. We take it that this was west of the unloading platform, where there was no room for Harvey to pass with a loaded truck standing on the passageway without pulling to and on the railroad track. These were the "obstructions" which, according to a deal of testimony, caused the deceased to veer to his left and onto the track in order to avoid it, and pass beyond to the place where the train usually stopped. Whether this veering was intentional is not known. It is only known that there were not the usual number of lights, that there was an obstruction on the way.

y v. Louisiana Western R. Co

tation lights, and it seems beyond question out (burnt out) at the time. The width of it is so narrow that it was not sufficient for the trucks to pass each other in front of the truck which projected out from the depot to the street before referred.

It seems to us that the late expressman was seen to the accident going west with his truck which was loaded with trunks—which was a narrow passageway. The loaded truck was on the sidewalk at the end of the gang plank which was on the platform before mentioned. The latter—had been placed there by the ticket agent or

the duty of the expressmen who handle the trucks. We infer that there was any hard and fast duty to have the trucks at the station; but not pushed to or pulled to the train before passenger trains always stop at the same place.

It is the place at which the train stopped on the street and the issues bearing upon the case.

As to the "depression" of the land along the street and the depot, there can be no special finding. It was not intended to be any part of the case. The depression does not seem to particularly bear upon the case when the deceased came to the obstruction, or him to turn and follow along the depression. We understand, uneven. He could only go straight on, which at a particular place, because of the depression was not wide enough. We infer that when he changed his course. Just then the train was at some distance. It was hardly reconcilable with the thought that at the usual rate of speed when approaching a station on the way. We let this pass for the time being the fact to which the witnesses have testified that the train had come to the point that it was running at the usual rate of speed approaching a station at which it is to stop; that is an hour. At that rate of speed the conductor testified that it could be stopped within 20 or

or the defense said that it would take about perhaps said inadvertently. The conductor, testified that such a train running at that rate of speed could be stopped within 20 or 30 feet.

That the truck was seen ahead about 75 feet from the track. The engineer of the train testi-

Harvey v. Louisiana Western R. Co

"I saw a man pulling a truck right before the track," and "I saw that it was away from the track, and that there was no necessity of my paying any attention to it at all," and "I did not think that he was going to come on the track." "I never paid any attention to their moving their truck about."

He confined his attention to "dangers between the rails."

The collision between the truck and the train, though it must have been violent, it seems was not felt by him (the engineer), or, if felt, we are not informed. The fireman knew nothing of it. The engineer made no mention of it to him. The testimony of the engineer is not clear upon this point. The distance is not stated even approximately at which the deceased was from the head of the car. We will not pursue this particular point any further. The theory it suggests does not bring conviction to our minds to any extent rendering it proper in our view to write a judgment setting aside the verdict and decree of the district court.

Accidents will arise. They are inevitable. Sometimes they arise from a moment's inattention or unconcern of one in charge.

We are not impressed with the view that the whole of the "last chance" in this case was exhausted. The testimony does not justify such an inference. Our court has, in exceptional cases, had occasion to give effect to the doctrine of the "last chance." *McClanahan v. V. S. & P. Ry. Co.*, 111 La. 782, 35 South. 902; *Downing v. Railway & S. Co.*, 104 La. 517, 29 South. 207.

A close watch and hasty action, it seems to us, might have resulted in avoiding the accident. It does not appear that there should have been an earlier stop than the one made. The car was permitted to run along until it arrived at the usual stopping place.

The deceased was neither a trespasser nor a licensee. He was trudging along for a livelihood hours before day at his usual place of work.

Ordinarily the workman who is industrious and fond of his work—we infer from the evidence that the deceased was of that number—becomes accustomed to the place at which he works, to the implements, tools, and surroundings. It becomes almost instinct with him. He follows the beaten path almost instinctively while at work. If anything be displaced, or a change is made, he takes some little time to adopt himself. For that reason we take it the rule imposes the duty upon the master to furnish a reasonably safe place to those who work for him. A safe place should be provided. There should have been no obstruction on the track. *Faren v. Sellers & Co.*, 39 La. Ann. 1019, 1020, 3 South. 363, 4 Am. St. Rep. 256; *Helm, Tutrix, v. E. & J. O'Rourke*, 46 La. Ann. 185, 186, 15 South. 400; *Mattise v. Ice Co.*, 46 La. Ann. 1539, 16 South. 400, 49 Am. St. Rep. 356; *Myhan v. Electric Co.*, 41 La. Ann. 964, 6 South. 799, 7 L. R. A. 172, 17 Am. St. Rep. 436; *Carter v. Dubach* (La.) 36 South. 952.

Irvey v. Louisiana Western R. Co

a less number of lights than usual. There was the passageway, which the deceased sought to go on one side, and which was the more dangerous because of the less light than usual and because of the rate of travel. A number of witnesses were heard in respect to the speed. If we were to take the number of witnesses who appeared that of the thirteen who testified the deceased testified for the defendant, and stated that the usual rate.

The testimony is not to be determined by a majority proper we should state, is not the position of the defendant. They have not claimed that any use of the number of witnesses. It remains as the train going east and the train going west in question. We understand that the deceased lost time is sometimes an incentive to keep the train. This may be considered as corroborative of the facts.

The deceased was in at a fast rate of speed, as testified to by the plaintiff—so fast that it passed and went to a stopping place—then may it not well be that the deceased was taken by surprise; that he had conceived the train was passing, not suspecting that the train would come so close; particularly may he have been taken by surprise on the night failed to stop, as it usually did, to take water?

It is found ground to set aside the finding of facts as inferred from the verdicts and judgment.

In the chapter of contributory causes which have been mentioned: The failure to exhaust the last chance; the insufficient light; the obstruction in the passageway, which prevented the deceased from passing when he was overtaken. From the evidence, the rate of speed of the train (and the negligence) and against which he was entitled to rely, the rule which applied to the master and all the employees, even by an ordinance of the town which was against the danger, which limited the rate to six miles per hour.

The witnesses, saw them, observed their manner. They were acquainted with the locality. The evidence was against them. They found for plaintiff. We think they have erred, for it is not evident that they were negligent.

The amount of damage: The deceased was 29 years of age; his wages were \$40 a month. He was married, and had three children, aged, respectively, 7½, 5½, and 4 years. The deceased died about 12 hours after the accident.

The evidence being in favor of plaintiff, the verdict and judgment of the court are affirmed to the extent of the damages with legal interest from the 5th day of May,

Harvey v. Louisiana Western R. Co

1904. The verdict and judgment for a larger amount than the above is rejected, and to that extent the judgment appealed from is amended.

PROVOSTY, J., not having heard the argument, takes no part.

On Rehearing.

NICHOLLS, J. Defendant contends that, in view of the notice given of the approach of the west-bound train to Crowley by the whistle of the locomotive sounded at the whistling post about a mile to the east of the city, it was the duty of Harvey to have started earlier than he did to take his truck to the west of the baggage truck of the company, which was already standing between the south rail of the track and the platform which ran out from the depot to the track; either that, or that his movements should have been more rapid than they were. It maintains that, had this been done, the accident would not have occurred, as he would have reached the objective point he was aiming for in safety. We think these propositions were beyond question true, but in testing his conduct we must ascertain what the conditions usually existing were when trains came up to the depot from the east, and what they were on the night of the accident. The evidence shows that there is a water tank a very short distance above the city, at which trains from the east usually stopped to take on water before entering Crowley; that when they moved forward they did so with only such speed as would be given from the movement of the train resulting from its moving over the short space between the tank and the depot with the momentum given to it in view of an immediate stop. On the night in question the train was 20 or 25 minutes late, and was evidently trying to make up time, as, instead of stopping at the tank as usual, with the delay and loss of speed incidental to the stop at the tank, it passed directly to the depot. The length of time taken by the train to go from the whistling post to the depot was less than usual, while the speed at which it came in was greater. Harvey's course was evidently guided by what would have happened had matters taken their usual course. Had they in fact taken such course, Harvey, we think, would have reached the point he was aiming at without risk or danger. Under the conditions actually existing, his action was imprudent, and, as it turned out, attended with fatal results to him. The testimony is conflicting as to the speed at which the train came to the depot, but we think the jury had reasonable ground for reaching the conclusion that it was unusual. Outside of the testimony actually introduced, the probabilities are in support of that conclusion. The evidence goes to show that the depot grounds were not sufficiently lighted by the company, as they should have been. Had they been lighted, the engineer would have seen Harvey's position by the side of the track clearly and distinctly. As matters were, he saw indistinctly what was at the depot. We give substantial extracts from the testimony of Williams, the engineer of the train, given on cross-examination, leaving out most of the questions. Witness in go-

Harvey v. Louisiana Western R. Co

did not see Mr. Harvey. He saw some one, whether it was Harvey or not. He saw a man get beside the track. He was about 50 or 60 feet from the engine at or near the freight depot. He was right alongside of the track. Witness saw the man get from the track, and that there was no necessity of paying any attention to it at all. It was away from the track. In the testimony given on the first trial witness said something about the truck, but he did not see it. He said he saw the truck about the length of the engine—something in the neighborhood.

In his former testimony, the witness, coming back to the accident, said he saw on the right of way a little light going out, but nothing else. He did not see a truck or baggage. He did not know how far Mr. Harvey was from the platform when he first saw him. He was looking at the light, and not paying much attention to those off to the side. The beam projected about two feet from each side of the train. The train was moving at the rate of six or eight miles an hour. Witness said something like that. Asked why he did not stop the train, he answered he did not think he was going to come on. He said he never paid any attention to the baggagemen moving their trucks about. Asked whether he was on the lookout for danger at the stations, he answered yes. He said at all stations I look out for danger between the cars. Witness said in the testimony given by him on the first trial he had stated "that he saw a truck slowing up but he could not see the man. He was in the dark."

On the second trial) to the air brakes on the train, he said he knew what is known as a "low-speed brake." After the pressure was put on to 15 or 20 pounds you could stop the train. A low-speed brake would carry 70 pounds. It carried that much pressure. Fifty pounds would, of course, stop quicker than 70 pounds. He said he saw Mr. Harvey he had nearly all the brakes on.

He could have put on two pounds more, he said. He was asked the question with reference to that train at the time of the accident, "could you have stopped it within a distance of fifteen or twenty feet?" He answered yes, he could, and would have done it had he been on the train. He said he was going to get on the track. He could have stopped the train by using the lever—the reverse lever. The effect of the lever is to reverse the steam and stop the train. He said he was on the engine that night. It was too quick. He was too quick. The train must have struck the rear end of the truck. Mr. Harvey was not on the track when struck. He was back to pass by without striking him. Witness said he knew the city ordinance requiring the speed of the train to be not more than six or eight miles an hour. He got his information from the city ordinance. On the first trial of the case witness

Harvey v. Louisiana Western R. Co

testified that he first saw the truck about 10 feet west of the platform, about the length of a car and a half ahead. Asked, "What did you do then?" he answered, "I stopped." Asked, "Did you apply the emergency brake?" he answered, "No, sir." Asked, "You made no effort whatever to stop that train?" he answered, "My train was under control, and I stopped at the usual place, and the emergency brake could stop no quicker."

It is evident from the testimony of the engineer that he did not consider his duty of keeping a lookout for danger ahead extended beyond the ground inside of the rails. That he was not called upon to take into consideration the condition of things existing just outside of the rails as to objects within two feet of the rails, which were bound to be struck by the pilot beam. In this view of his duty the engineer was greatly mistaken. That portion of the ground ahead was subjected to his scrutiny as much as that within the rails, particularly at such a danger point as the immediate surrounding of the depot of a city, where conditions are likely to exist at any time which would lead up to death and injury. It is evident from his own testimony that the engineer, after seeing the truck as close as it was to the tracks, took no steps whatever to check the train, but left matters to run precisely the same course which they were running before, as if he had not seen it. He seems to be of opinion that, having blown the whistle at the whistling post, and slackened the speed which the train had at that point, he had no further duty to perform, and no concern as to what might happen thereafter, unless as to some object which might actually come inside of the rails.

We need scarcely say there was great misconception by the engineer as to what his position called for. It is claimed on his behalf that he was not called on to anticipate that the company would place one of its baggage trucks between the projecting platform and the rails, and that at the precise moment the train was approaching an expressman would attempt to pass between the baggage truck and the rail. It may well be that that particular state of facts might not have been anticipated, but he was bound to anticipate that at such points some dangerous conditions might exist calling for special immediate action, and he should have been prepared to meet it to the full extent of the instrumentalities within his power, governed as to this by no conventional rule. The engineer admits himself that the instrumentalities within his control were not exhausted. Besides other instrumentalities, a single tap on the bell at the opportune moment might have saved Harvey's life.

In the event that the court should hold that Harvey was guilty of contributory negligence in moving with his truck at the time and place he did, counsel of plaintiff invoke an application of the doctrine "the last clear chance," and refer the court to the case of *Bogan and Wife v. Carolina Central Railroad*, 129 N. C. 154, 39 S. E. 808, reported in the 55th Vol. *Lawyers' Annotated Reports*, page 418; to *Inland and Seaboard Coasting Co. v. Tol-*

Selby v. Detroit Ry

U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, and Grand R. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 100; to Kramer v. New Orleans City and Lake R. R. Co., 118 La. Ann. 1689, 26 South. 411; McGuire v. Vicksburg, Shreveport & Gulf R. R. Co., 46 La. Ann. 1543, 16 South. 457; Lampson v. McCormick, 105 La. 418, 29 South. 952, 83 Am. St. Rep. 100; Downing v. Morgan's La. & Texas R. R. Co., 104 La. 508, 29 South. 207; McClanahan v. V. S. & P. Ry. Co., 111 La. 782, 29 South. 902; Becker v. L. & N. R. Co. (Ky.) 61 S. W. 997, 100 Am. St. Rep. 267, 96 Am. St. Rep. 459; Shear. & Redf. Neg. vol. 3, 484.

The jury by their verdicts found this claim of the plaintiff well founded, and this court has, on an independent examination of the facts, found likewise. We have on this rehearing examined the testimony, and we do not think we would be justified in undoing what has been done already. On the contrary we think the jury (in the exercise of the right and authority conferred on it) could well have found a state of facts which would have justified their verdict. We should therefore not disturb the judgment heretofore pronounced by us in this case, and it is hereby so ordered and decreed.

ROE, J. I dissent.

SELBY v. DETROIT RY.

(Supreme Court of Michigan, July 24, 1905.)

[104 N. W. Rep. 376.]

Railroads—Injury to Passengers Alighting.*—A passenger on a street car notified the conductor to stop at a street crossing. The car carried him beyond the point of stopping prescribed by an ordinance requiring cars to stop on the further side of the street crossing by them. The bell was immediately rung, and the car stopped. While the passenger attempted to alight, he was injured by the starting of the car. Held that, though the car stopped at an illegal place, the passenger had the right to assume that it stopped in obedience to signals to let passengers alight, in the absence of knowledge that it stopped for another purpose.

Stopping Cars to Enable Passengers to Alight.†—Where a

foot-note appended to Chicago Union Traction Co. v. Hamilton, 15 R. R. R. 19, 38 Am. & Eng. R. Cas., N. S., 19.

For the authorities in this series on the subject of the care due to passengers, see foot-note appended to Chesapeake & O. R. Co. v. Smith (Va.), 15 R. R. R. 241, 38 Am. & Eng. R. Cas., N. S., 19; Cain v. Louisville & N. R. Co. (Ky.), 14 R. R. R. 376, 37 Am. & Eng. R. Cas., N. S., 376; Topp v. United Rys. & Elec. Co. (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; foot-notes appended to Reagan v. St. Louis Transit Co. (Mo.), 13 R. R. R. 688, 35 Am. & Eng. R. Cas., N. S., 688; Southern Ry. Co. v. Bandy (Ga.), 13 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736; McDonald v. City of Detroit (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; Rutledge v. New Orleans, etc., R. Co. (C. C. A.), 11 R. R. R.

Selby v. Detroit Ry

street car is stopped under circumstances which justify a passenger in believing that he is invited to alight, the conductor must not start the car while passengers are alighting.

Error to Circuit Court, Wayne County; George S. Hosmer, Judge.

Action by Marion Selby against the Detroit Railway. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before CARPENTER, MCALVAY, GRANT, MONTGOMERY, and HOOKER, JJ.

Corliss, Leete & Joslyn, for appellant.

James H. Pound, for appellee.

GRANT, J. This case is before us for the second time. See 122 Mich. 311, 81 N. W. 106. A full statement of the facts here is therefore not essential. The theory of the plaintiff and of the defendant is there stated. We there declared the law of the case in the following language: "If the claim of the plaintiff was true that she had been carried past the place where she desired to alight, and the car was stopped farther on by the conductor to enable her to alight, then it was negligence on the part of the company to start the car while she was in the act of stepping from the car to the pavement." The plaintiff had notified the conductor that she desired to stop at Park Place. He did not stop. Plaintiff and her escort were standing upon the rear platform of a crowded car. She said to her escort that the car is not going to stop, and thereupon he stepped to the door, and the bell was rung, the car immediately checked its speed and stopped about the center of Washington Boulevard, opposite the end of what is called the "Parking." The usual place of stopping is on the opposite side of Washington Boulevard. Plaintiff claims that while the car was standing still she proceeded to alight, the car started, and threw her to the pavement. The court instructed the jury that: "If the car had come to a full stop, I think, under the circumstances, it operated as an invitation to her to alight. * * * If the car had come to a stop, it was the conductor's duty to see, before allowing the car to proceed, that no person was in the act of alighting, and it was the motorman's duty, before he started the car, to receive the proper signal from the conductor. * * * If the plaintiff attempted to alight from the car before it had stopped, and while it was still moving, she was guilty of contributory negligence, and cannot recover." Counsel for defendant contend that the question whether the plaintiff was justified in assuming that the car had stopped for her to alight was one of fact for the jury, and not of law for the court. This presents the sole question for determination.

488, 34 Am. & Eng. R. Cas., N. S., 488; foot-note appended to *Meade v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 13, 34 Am. & Eng. R. Cas., N. S., 13; foot-notes appended to *Norfolk & A. Terminal Co. v. Morris' Adm'x* (Va.), 9 R. R. R. 165, 32 Am. & Eng. R. Cas., N. S., 165.

Selby v. Detroit Ry

ordinance requires that cars shall be stopped on the side of the street approached by them. The contention of defendant is that the car had stopped in an unusual place, and under unusual conditions, created by the number of cars present, requiring the rear cars to slow their speed or to stop in order to give the car ahead time to unload its passengers at the usual place; and that if the plaintiff saw, or should have seen, the cause for stopping, it was her duty to remain upon the car until arriving at the usual place for passengers to alight, on the opposite side of the street. It is clear that the plaintiff did not know the cause of the stop. She knew she requested the conductor to stop and let her off at Park Place; that the car had been carried past; that the bell had immediately rung for a stop; that the car immediately, in response to the bell, had slowed down, and finally stopped. Under these circumstances she had a right to assume that the stop was made in response to her request in order that she might alight. There is no more difficulty in alighting in the center of the street than on the side. It was entirely natural for her to conclude that the conductor had temporarily forgotten her desire to alight at Park Place, had recalled it, and had signaled for the car to stop, so that she could get her escort, and others might alight. We are not dealing with a case happening in broad daylight, where the passenger could see all the surroundings and the reason for stopping as well as the conductor and motorman. If many cars were in use upon this line, and were crowded on account of the number of passengers who had been to see a show on the outskirts of the city, it was all the more necessary that the conductor should exercise care, and see that no one was attempting to get off after the car had stopped and before starting. Cases of passengers alighting at the regular stations of steam railways, where platforms are provided, and brakemen, porters, and conductors are employed to call off the stations and to assist passengers in alighting, have little or no application to street railways, where the street is the only place of alighting. We have examined the railway cases (*Poole v. Railway Co.*, 100 Mich. 379, 59 N. W. 25 L. R. A. 744; *Jackson v. Grand Avenue Ry. Co.*, 118 Mich. 24 S. W. 192; *Nichols v. Middlesex Ry. Co.*, 106 Mass. 249; *Hutton v. O. & C. B. Ry. Co.*, 90 Iowa. 249, 57 N. W. 39; *Chicago Ry. Co. v. Mills*, 91 Ill. 39; *North Birmingham Ry. Co. v. Calderwood*, 89 Ala. 247, 7 South. 360, 18 Am. L. R. A. 105) cited by the defendant, and none of them parallel the facts in this case, and have but little bearing upon it. None of them are in conflict with the rule herein announced. The only question of fact was whether the car had stopped, or whether the plaintiff attempted to alight when it was moving. This question of fact the jury decided in favor of the plaintiff. When a street car is stopped under circumstances which justify a passenger in believing that he is invited to alight, it is a reasonable and universal rule that the conductor must not move the car while the passengers are in the act of alighting.

Hatch v. Philadelphia & R. Ry. Co

A motion was made for a new trial on the ground that the verdict is excessive. This motion was overruled by the court, and we do not think the evidence justifies us in reversing the case on that ground.

Judgment affirmed.

HATCH v. PHILADELPHIA & R. RY. CO.

(Supreme Court, of Pennsylvania, May 8, 1905.)

[61 Atl. Rep. 480.]

Carriers—Injury to Passenger.*—Where a passenger is thrown from the step of a car, while attempting to enter it, by the starting of the car before he is safely on, the railroad company is liable for the injuries received.

Same.*—Where persons in charge of a train give the signal to start when every one reasonably to be regarded as a passenger is safely on, there is no negligence as to one stepping on the platform just as the train starts, who is thrown off and injured.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles J. Hatch against the Philadelphia & Reading Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Harry A. Mackey and Augustus Trask Ashton, for appellant.
Gavin W. Hart, for appellee.

BROWN, J. It is the duty of the crew of a passenger train, the conductor and brakemen having it in charge, to see that all passengers boarding it, or manifestly intending to board it, are safely on it before the signal is given to the engineer to start. Failure to do so is negligence, and, if a passenger is thrown from the step or platform of a car by the starting of it before he is safely on it, the railroad company is liable for the injuries sustained. While it is the duty of those having a train in charge to see that it is not started until all passengers are safely on it, they are not

*For the authorities in this series on the subject of the care required in receiving passengers, see foot-notes appended to *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; foot-notes appended to *Foster v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640.

For the authorities in this series on the subject of the liabilities of carriers for injuries to their passengers caused by jerks and jolts of trains or cars, see foot-note appended to *Faul v. North Jersey St. Ry. Co.* (N. J.), 15 R. R. R. 694, 38 Am. & Eng. R. Cas., N. S., 694; foot-notes appended to *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; foot-notes appended to *Yazoo & M. V. R. Co. v. Humphrey* (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1; *Norfolk & A. Terminal Co. v. Morris* (Va.), 9 R. R. R. 165, 32 Am. & Eng. R. Cas., N. S., 165.

Andrews v. Yazoo & M. V. R. Co

regarded as careless, and their company, through them, if they give the signal to start after every one reasonably be regarded as a passenger is safely on the train, and, especially one, not only not seen by them, and, even if seen, reasonably to have been regarded as an intending passenger, the platform just as the train starts and is thrown off and

this plaintiff, there was no evidence of the railroad company's negligence, and he was rightly nonsuited. The question of negligence depended entirely upon his testimony. He testified that he was at the Mt. Pleasant station as an intending passenger. When the train pulled in, he saw the train pulling in. There was a lawn in front of the station building of the same grade as the tracks. When he reached the steps leading up to the lawn, the train was starting. Smoking a cigar, he walked leisurely towards it on the lawn in the direction of the last car, but neither said anything to indicate to the crew, if they saw him, that he intended to get on the train. On the contrary, if they did see him, they saw him slowly walking in the direction of the last car, with no indication in his movement that he intended to become a passenger. By no sign nor word did he give any indication of such an intention. He says he did not see any of the crew. This is probably so, for, after stopping at the station and waiting, he saw no indication of an intention by any one to become a passenger. They may have all gone inside the cars, and the signal was given to start. If, after having stopped, the signal was given to start with no intending passenger in sight, or if it was given while the appellant was in sight, but clearly, from his own testimony, he was not to have been reasonably regarded as one intending to become a passenger, there was no negligence in starting the train. He stepped on it just as it started, he is without remedy, for the company was not negligent under the circumstances.

Judgment affirmed.

ANDREWS v. YAZOO & M. V. R. Co.

(Supreme Court of Mississippi, July 17, 1905.)

[38 So. Rep. 773]

—Relation of Passenger and Carrier—Evidence—Assault—
***—Where plaintiff, who intended to take a train not due for**

the authorities in this series on the question as to who are, and who are not, passengers, see foot-notes appended to *Quantz v. South-Central R. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 226; *Mont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25; *Garvey v. Island Co.* (R. I.), 15 R. R. R. 30, 38 Am. & Eng. R. Cas., N. S., 20; *Holmes v. Birmingham Southern R. Co.* (Ala.), 14 R. R. R. 37, 37 Am. & Eng. R. Cas., N. S., 815; *Anderson v. Seattle-*

Andrews v. Yazoo & M. V. R. Co

an hour or so, and who had purchased no ticket, obtained permission from the station agent to do some writing in the office of the station, and while there he and the agent became involved in an altercation over a private matter, in which the agent committed an assault on plaintiff, the railroad company was not liable; the relation of passenger and carrier not existing, and Code 1892, § 4313, requiring railroad companies to furnish suitable reception rooms, and to protect passengers from offensive conduct, having no application.

Appeal from Circuit Court, Sunflower County; A. McC. Kimbrough, Judge.

Action by O. B. Andrews against the Yazoo & Mississippi Valley Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The evidence for plaintiff was in substance as follows: Plaintiff, who was a traveling inspector for an insurance company, was in Ruleville (a small village), and, having some acquaintance with the depot agent at that place (a Mr. Travis), went to the depot an hour or two before the train he desired to take was due, and went into the depot, through a side entrance provided for the employees of the company, and spoke to the agent through a window, and requested the privilege to enter the private office and to do some writing, which the agent permitted him to do. The agent, at his request, furnished him with a place to write, some stationery, and pen and ink, and he began to write up his daily report to the company. Plaintiff testified that he went to the station to catch a train. "I walked into a little anteroom, and accosted Mr. Travis, who was behind the desk, and said, 'Mr. Travis, I have an hour or so until train time, and I know it is against the rules of the company, but I have some letters or reports to make up, and I would like to come in and write these, if agreeable to you.' And he consented, and I walked around into the office, where the tickets were, and told him I had no stationery of my own, that I didn't have my grip, and that I would like to sponge on him, I believe, for a little stationery, and he very kindly gave me some, and his pen and ink; and I had written several pages, and had my back to him. He remarked, 'I understand you didn't have a very good opinion of me the last time you was here;' and I stated I had not thought much about it, and had not thought of it. He said, 'I heard you made some remark about me;' and I asked what it was, and he told me what it was, and said, 'I have a friend who overheard you;' and I said, 'Get your friend, and we will go over the matter;' and he went out, and was gone some time, and came back with his friend; and he said, 'Here is the man who heard you make the remark about

Tacoma Interurban Ry. Co. (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S. 380; Birmingham, etc., Co. v. Bynum (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S. 683; Rowdin v. Pennsylvania R. Co. (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S. 672; McNeill v. Durham & C. R. Co. (N. Car.), 13 R. R. R. 647, 36 Am. & Eng. R. Cas., N. S. 647; Foster v. Seattle Electric Co., 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S. 640; Hudson v. Lynn & B. R. Co. (Mass.), 13 R. R. R. 622, 36 Am. & Eng. R. Cas., N. S. 622.

Andrews v. Yazoo & M. V. R. Co

and I got up and sat on the corner of the desk, and Mr. said, 'You made the remark at Moorehead;' and I said, 'I know that I did make this remark, but you seem to want my way, and seem to be looking for trouble, and you can let it go that way.' Mr. Travis said, 'I want an apology,' and I said, 'I thought it necessary I would make one. Then Mr. Travis drew back his hand, and I made a dive for him, and he pulled out a pistol.' He further stated that Travis hit him over the head with the pistol, inflicting a wound. He bought a ticket. The court gave a peremptory instruction for the defendant.

son & Neil, for appellant.
es & Longstreet, for appellee.

Y, J. Under no theory of law applicable to the facts disclosed by this record can any liability attach to the appellee. It is perfectly obvious that the relation of carrier and passenger did not exist between appellant and appellee at the time of the difficulty between appellant and Travis. Appellant, according to his statement, did not resort to the depot for the purpose of securing passage upon a train, nor with the intention of establishing the relation towards the appellee of passenger and carrier.

Giving his statement the most far-reaching effect and the broadest meaning of which his language admits, while his intention was ultimately to take passage when the train not due several hours should arrive, the prime object of his going to the depot at that hour was that he might have a comfortable and convenient place in which to transact the business of writing up his insurance reports—a strictly private matter. While transacting this business he became involved in a dispute, and, subsequently, a difficulty, with Travis about another matter, purely personal to themselves, not even remotely connected with the business of Travis or the business of appellee. At that time appellee was not in any sense "put himself in the care of the carrier, and was not within its control, with the bona fide intention of becoming a passenger," and, hence, under the general rule, the relation of carrier and passenger had not begun. 5 Am. & Eng. Enc. of Law, 488. Nor was he at the time of the occurrence in any way prepared or intended for the accommodation of passengers. On the contrary, he was, in knowing violation of the rules of the railroad company, availing himself of the courtesy of the agent, Travis, who, upon the special request of appellant, lent him the use of his private office.

Our opinion, section 4313, Code 1892, has no application to the facts of the instant case. That section was intended to confer the convenience and comfort of the traveling public, first, by providing comfortable and cleanly rooms for their reception and accommodation; and, second, by protecting them from disorderly and offensive conduct from others. This section attempts to achieve the desired end by imposing it as a positive duty on all railroad companies at every passenger station to keep

Willis v. Vicksburg, etc., Ry

open, under the conditions and for the time stated therein, cleanly, warm, and properly lighted reception rooms, and by vesting the person in charge of such rooms with necessary power as a conservator of the peace. But appellant at the time of the difficulty of which he now complains, though in fact due to his own reprehensible language and aggressive conduct, was not in the room so prepared, but in another part of the depot building, into which he had gone in furtherance of his personal ends, and in willful disregard of an established rule of the appellee. We hold that every prospective passenger or other person lawfully entitled to the use of the reception rooms at a passenger station, and whose own conduct is not boisterous or offensive, is protected in such use by the provisions of the section cited. But that statute cannot be so extended as to cover a difficulty of a personal nature, not growing out of or connected with the service of the employee or the business of the master, arising between two individuals not in the reception room, even though one of the parties should be an employee of the railroad company owning or controlling the depot.

The judgment is affirmed.

WILLIS et ux. v. VICKSBURG, S. & P. RY. et al.

(Supreme Court of Louisiana, June 19, 1905.)

[38 So. Rep. 892.]

Backing Engines—Lookouts.—The company is liable for backing an engine and tender without a lookout.

Same—Same.—There were two men on the engine—the engineer and his helper. Neither saw the accident.

Same—Death of Licensee—Absence of Lookout.—In backing a short distance over depot grounds and depot yards, there should have been some one on the lookout. It does seem that the engineer could have been on the lookout, for it does not appear that while running at a very slow rate of speed the engine requires extraordinary attention; or the fireman, who has very little, if anything, to do on the way from depot to roundhouse, and no further, might have been on the lookout at or near the front of the tender.

Same—Same—Same—Presumption of Negligence.—The collision took place with the tender in front of the backing car, whereby the man lost his life. Because of the absence of a "lookout," the mind is led to a presumption of negligence on the part of the defendant company, which, if it might have been rebutted, was not rebutted. It does appear that a lookout could have avoided the accident.

In the absence of explanatory evidence, negligence was found by the jury, which on appeal does not appear erroneous.

Negligence—Prima Facie Case.—The maxim *res ipsa loquitur* is applicable. There was prima facie evidence of negligence, which defendant failed by its testimony to explain away.

Trespassers—Railroad Yards.*—Yards about a passenger depot are

*As to who are, and are not, passengers, see foot-note appended to preceding case.

As to who are, and are not, licensees on railroad tracks or premises, see foot-notes appended to *Booth v. Union Terminal Ry. Co.* (Iowa), 14 R. R. R. 768, 37 Am. & Eng. R. Cas., N. S., 768.

Willis v. Vicksburg, etc., Ry

c place. One is not a trespasser who follows a pedestrian path in the attempt to get on the train about to leave, although this path is some feet away from the depot.
 oe and Provosty, JJ., dissenting.
 bus by the Court.)

deal from First Judicial District Court, Parish of Caddo;
 s Fletcher Bell, Judge.

on by B. A. Willis and wife against the Vicksburg, Shreve-
 Pacific Railway and others. Judgment for plaintiffs, and
 ants appeal. Affirmed.

& Jack, for plaintiffs.

, Randolph & Rendall, for defendants.

AUX, C. J. Plaintiffs are the father and mother of the
 . W. Wills, a young man about 23 years of age, who lost
 e in the railway yards in the city of Shreveport on the
 ay of September, 1903, after dark on that day. The
 t claimed by plaintiffs is \$15,000.

ll of exception is before us, taken by defendants, which
 disposed of preliminarily. The court charged that yards
 a passenger depot are a public place, and those who go
 n to get on a train about to leave, and by mistake get on a
 hat has just come in, and is being pulled out to a coach
 re not trespassers, even although they follow cars beyond
 ual place for getting on and off, by two or three hundred

contention of defendant is that the charge is objectionable
 e it states a certain position at or near the depot that the
 is supposed to have reached, which was a fact which
 have been left to the jury.

n any point of view, the young man was either on the
 grounds, or on defendants' yard. The court's statement
 e was not a trespasser, standing on the one or the other, was
 versible error. In our view, a passenger who leaves the
 grounds to get to the train on which he wishes to take pas-
 not a trespasser, under the circumstances here, and con-
 g the short distance the young man ran over a beaten

, we think, disposes of the second bill of exception taken
 ounds very similar, and the same is true as relates to the
 ill of exception.

y (plaintiffs) charge in their petition that the killing of
 on was due to the negligent management of one of defend-
 employees.

place of the accident was within the limits of the city,
 ne Union Depot, in the yards of the railroads.

is came to Shreveport in company with two other young
 n an excursion train from Hughes Spring, Tex. As it
 out time to leave, these young men walked to the depot.
 y saw a train about to leave or leaving. They ran to get

Willis v. Vicksburg, etc., Ry

aboard. Two of the three ran ahead, and after they were on the train the porter said to them that they had made a mistake; they were not on the excursion train on the track No. 5. There are six tracks in all. They then left this train and went to the excursion train; i. e., they got off and started back to catch their train. Willis was left behind in the race and lost sight of by his two companions.

A few moments after they had left the train, as just mentioned, and on their boarding the excursion train, they heard of Willis' death.

In running, as just mentioned, the young men, companions of Willis, ran to a point west or farther out from the Union Depot than the point where Willis' body was found and where he was killed.

There were three men on the track; i. e., the three young men in question.

We have traced the steps of these young men from the city to the depot, and from the depot first to a train spoken of as the wrong train, and then to the right train, and while they were seeking to find their outgoing cars one of the number was killed.

Having followed these young men as just stated, we take up for consideration the movement of the engine and tender with which the deceased collided on the night fatal to him. The engine and tender are usually taken in charge by the hostler. This employee takes the engine to the train and to the depot, or, on the other hand, from the train and from the depot to the roundhouse.

At about 7:30 at night the hostler came to the engine, near the butting post. It was turned toward the depot. The head of the engine was thus turned. It was on track three. It had no cars connected to it. This hostler had a helper. The work to be done with that engine consisted in backing down No. 3 track to the main line of the Vicksburg, Shreveport & Pacific Road, and then take the main line, and head down the main line to the roundhouse.

As usual, he backed the engine out on his way to the roundhouse. This hostler or engineer testified that, a moment after he had thus commenced to back the engine, he noticed the deceased, coming down the track, passed him (that is, passed the engine), and then climbed up to the side of the track, "got up on the steps, and swung around the corner. I thought he got on the back end, going to the side of the back end. I did not see him any more until we passed over him"—to quote from the testimony of the engineer.

The accident occurred, this engineer says, just before getting on the main line. The engine and tender were stopped to enable the switchman to throw off the switch to "head down on the main line." The body of the young man was found near the connection between the main line and No. 3 track.

The engineer does not know when his engine passed over the

Andrews v. Yazoo & M. V. R. Co

There was no jar felt by him. The wheels of the tender over the body first, and in all probability there was very many, jar while the wheels of the engine were passing

body was found about 20 feet in front of the pilot. The was reversed, which accounts for the body being in front lot.

deceased was familiar with railroading. He occupied a position on one of the railroads—brakeman or fire-

also in place here to state that the engine was running at of about two miles an hour at the time of the accident.

was at this place a passageway followed by pedestrians defendants' yard, although they have attempted at dif- ficulties to prevent pedestrians from passing. Despite the , the pedestrians will pass.

is a large space on this yard taken up with the different It being level and dry, frequently pedestrians walked to t on these tracks at the place where the young man was and passed over as before mentioned.

f defendants' witnesses stated "that there is a great deal ng of people on foot up and down the right of way where ng man was killed. Yes; people walk up and down here ng. The ground there is pretty well beaten."

engineer or hostler who had charge of the engine stated ness that he saw the deceased grab the rail on the side tender and board the tender.

vident that the jury did not attach much importance to mony of this engineer. If the young man grabbed one rails and boarded the tender, as he stated as a witness, conclusion is that he was imprudent to a degree render- very of damages not to be thought of. This is conceded parties concerned. But the engineer was not consistent statements out of court.

iffs attacked the statement as incorrect, and base their mainly on the fact that the locomotive and tender were at the rate of only two miles an hour. Why should the man have gotten on the engine, running at that rate, in catch the outgoing train he was anxious to board? is ially the question presented.

er ground of attack was that the engineer had made its not agreeing with those made under oath by him in These statements are not consistent. On a material point substantial difference. He said to two of the witnesses was taking his engine out; saw a man running across the whom he thought was the man killed; that he could not say he had caught onto the engine or tender, because he was side opposite from where the engineer was standing on ne. To quote from the testimony of this witness in an- a question as to what the engineer had said:

Bullock v. Boston & H. Dispatch Co

"Said he had not seen him catch on; the engine was between him and the man."

This statement of the witness is corroborated by other witnesses to whom he had given an account of the accident.

This issue went to the jury, who presumably knew the witnesses. At any rate, they heard the engineer testify.

The jury impaneled on the first trial failed to agree. On the second trial the verdict was nine in favor of a verdict, and three jurors against the verdict. After having read the testimony bearing upon the particular point before us, we have not arrived at the conclusion that the jury erred in not accepting the account of the engineer, contradicted as it was.

This brings us to a consideration of the other issues presented. The testimony all points to the fact that the young man was killed by engine 85 while backing out, as before mentioned, at the slow rate of speed. He was on his way to the train on which he was a passenger.

There was no one stationed at the end of the tender, on a lookout. Had some one been on the lookout, we infer that he could have avoided the accident. There were two men on the backing engine. Nothing shows that one or the other could not have taken a place on the tender as a lookout.

We infer that the work of the engineer and his fireman is not very exacting when backing an engine and tender from the depot to the barn. The fireman's work is very little. He might have been on the lookout—or the engineer himself, as to that matter—as one man alone is, we think, equal to running the engine the short distance mentioned above.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is, affirmed.

MONROE and PROVOSTY, JJ., dissent.

BULLOCK v. BOSTON & H. DISPATCH CO.

(Supreme Judicial Court of Massachusetts, Essex, Nov. 23, 1904.)

[72 N. E. Rep. 256.]

Connecting Carriers—Loss of Freight—Liability—Presumptions.*—

A case containing goods was delivered in good order to an initial carrier. When the connecting carrier delivered it to the owner, it was found that some of the goods had been removed and were lost. Held, that the loss presumptively occurred on the line of the connecting carrier.

Same—Same—Same—Sufficiency of Evidence.—On the issue whether a connecting carrier exonerated itself from liability for loss of goods delivered to it by an initial carrier, evidence held to justify a finding that the loss occurred on the connecting carrier's line.

*For the authorities in this series on the subject of the burden of proving which carrier was guilty of the negligence causing loss or injury to goods transported over several connecting lines, see footnote appended to St. Louis Southwestern Ry. Co. v. Birdwell (Ark.), 15 R. R. R. 57, 38 Am. & Eng. R. Cas., N. S., 57.

TEXAS MIDLAND R. R. v. DEAN.

(Supreme Court of Texas, March 29, 1905.)

[85 S. W. Rep. 1135.]

Arrest of Passenger—Liability—Scope of Employment.—Where the baggage master at a station, who was charged with the duty of checking baggage and attending to the waiting room, assisted an officer in unlawfully arresting a passenger while she was about to take a train, the carrier was liable, although the baggage master was not at the time actively doing anything in furtherance of the carrier's business.

Same—Duties of Carrier.*—A carrier is not required to make active resistance to an officer who is attempting to arrest a passenger, or to inquire into the authority under which the officer assumes to act.

Same—Acts of Employee—Evidence.—In an action against a carrier for the unlawful arrest of a passenger, evidence considered, and held insufficient to show that a servant of defendant instigated the arrest.

Same—Evidence.—In an action for unlawful arrest of a woman on a charge imputing want of chastity, it was error to refuse to permit defendant to ask plaintiff if she had not often before been arrested on similar charges.

Same—Same.—In an action for damages for an unlawful arrest of a woman on a charge imputing want of chastity, it was error to refuse to permit defendant to show that at the time of the arrest plaintiff was keeping a house of prostitution.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Ella Dean against the Texas Midland Railroad. A judgment of the Court of Civil Appeals affirmed a judgment in favor of plaintiff (82 S. W. 524), and defendant brings error. Reversed.

Ogden & Brooks, A. H. Dashiell, and T. L. Stanfield, for plaintiff in error.

W. F. Moore and Fred S. Dudley, for defendant in error.

WILLIAMS, J. This was an action brought by the defendant in error to recover of the railroad company damages for an illegal arrest and detention of herself, alleged to have been made by an officer of the town of Commerce and one Barton, the baggage master of defendant at its station at that town. The plaintiff recovered judgment, which was affirmed by the Court of Civil Appeals, and is now before this court on writ of error.

The evidence shows that the arrest was made by one Phillips, a policeman of Commerce, without any affidavit or warrant, and fails to show that plaintiff had committed any offense. Plaintiff adduced testimony to the effect that Barton voluntarily assisted

*As to when the carrier is, and when not, liable for the arrest or prosecution of a passenger, see foot-note appended to *Cordner v. Boston & M. R. R.* (N. H.) 11 R. R. R. 21, 34 Am. & Eng. R. Cas., N. S., 21; foot-notes appended to *Higby v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 479, 36 Am. & Eng. R. Cas., N. S., 479.

policeman in making the arrest, who
 testimony for the defense. The
 parties, when asked to state the
 did not know, but that they had been
 by the city marshal or city attorney
 plaintiff that he arrested her for
 complaint against her was filed the
 ing "vagrancy," from which she
 of these actions were taken upon
 company; the arrest, in the first
 complaint by Barton, being done
 attorney. Plaintiff, some hours before
 commerce over another railroad, and
 for the arrival of defendant's party
 a ticket from it to continue her
 and, when arrested, was going
 passenger train, which had arrived, to
 was baggage master at the station
 were "to check baggage and attend
 to states, in explanation of his position
 est, that it was his duty to be there
 under the charge of the station and
 that he or any of the trainmen
 opportunity to prevent the arrest.
 After this state of facts, the defendant
 the jury, and contends here, that
 action of Barton in assisting in the
 action was to take this view of the
 action and examination of the authorities
 sion that it is unsound. Plaintiff
 under the protection of the defendant
 s to whom it committed the passenger
 to her which it assumed by the carrier
 in such cases is, what servants
 nance of the carrier's undertaking
 be ascribed to the carrier? It has
 nest authority that the principle
 the crew of a vessel or a train
 transported. In the case of *Bryar*
 Rep. 311, the doctrine is thus sta-
 master is liable for what his servant
 ment; but, in regard to matters
 vice to be rendered, the master is
 at the servant does or neglects to
 ect to such matters he is not a se-
 officers or men connected with
 t's boat had met the plaintiff in t
 ion wholly disconnected with th
 and committed an assault and bat-
 e defendants would not have be-

Texas Midland R. R. v. Dean

plaintiff was a passenger for hire, we think it better to consider what the contract was between them. This has been discussed in the following cases: *Chamberlain v. Chandler*, 3 Mason, 242 [Fed. Cas. No. 2,575]; *Nieto v. Clark*, 1 Cliff. 145 [Fed. Cas. No. 10,262]; *Baltimore & Ohio Railroad Co. v. Blocher*, 27 Md. 277; *P., Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512 [91 Am. Dec. 224]; *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361 [93 Am. Dec. 99]; *M. & M. R. Co. v. Finney*, 10 Wis. 388. It has also been thoroughly discussed in *Godard v. Grand Trunk Railway*, 57 Me. 202 [2 Am. Rep. 39.] These cases were cited by Clifford, J., in *Pendleton v. Kinsley* [Fed. Cas. No. 10,922], and the terms of the contract for carriage by water are well stated by him in conformity with the authorities, as follows: 'Passengers do not contract merely for shiproom and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons either by the carrier or his agents employed in the management of the ship or other conveyance.' In respect to such treatment of passengers, not merely the officers, but the crew, are the agents of the carriers. In *Chamberlain v. Chandler*, 3 Mason, 242 [Fed. Cas. No. 2,575], cited above, Story, J., says that kindness and decency of demeanor is a duty not limited to the officers, but extends to the crew. The interpretation of the contract of the carrier which is given in the cases above cited is not unreasonable. It is not more extensive than the necessities of passengers require. Nor is it difficult to perform. The cases in which it is violated by servants, even of the lowest grade, on board a ship or engaged in the management of a railroad train, are rare; and the carrier, rather than the passenger ought to take the risk of such exceptional cases, the passenger being necessarily placed so much within the power of the servants." In that case the owners of a steamboat were held responsible for a wanton assault made upon a passenger by the steward and waiters in the saloon. In *White v. Railway Co.*, 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489, the same conclusion was reached concerning an assault made by the engineer of a steamboat. The principle has been applied to gatekeepers, brakemen, and porters and baggage masters on trains, and to drivers on street cars. *Hanson v. Railway*, 62 Me. 84, 16 Am. Rep. 404; *Gasway v. Railway*, 58 Ga. 216; *Williams v. Car Co.*, 40 La. Ann. 417, 4 South. 85, 8 Am. St. Rep. 538; *Dwinelle v. Railway Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Springer Transportation Co. v. Smith*, 16 Lea (Tenn.) 498, 1 S. W. 280; *Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

It appears that the baggage master was one of the employees selected by the defendant to render service to passengers about the station provided for their use, and that he was present and on duty when the arrest was made. In such places the passenger is as much entitled to proper treatment and protection as when he

Redington v. Harrisburg Traction Co

to recover damages for the shame and humiliation caused by this arrest upon a charge which, as vaguely as it is referred to in the evidence, yet plainly appears to have carried with it an imputation upon her chastity, and the fact that arrests had often before been made upon like charges was one which the jury might properly consider in determining the degree of the mental distress occasioned. *Parker v. Coture* (Vt.) 21 Atl. 494, 25 Am. St. Rep. 750; 3 Cyc. 1095, authorities cited in note 88; *Sutherland on Damages*, § 163.

We think, also, for the same reason, that the court erred in holding that evidence was irrelevant to show that at the time of the arrest plaintiff was the keeper of a house of prostitution in another town than that of her arrest. Certainly it will hardly be imagined that one so engaged would suffer so acutely from an arrest upon an imputation like that in question as would a pure and virtuous woman. The question whether or not plaintiff herself could be compelled to answer such a question was not raised. We think the evidence was not irrelevant.

It is true that an action for an illegal arrest does not, like actions for defamation or malicious prosecution, involve the character of the plaintiff, and hence evidence of bad character, merely, is not admissible in defense of such actions as this; and this we understand is what was held in the authorities relied on by plaintiff's counsel, among which is *Ryburn v. Moore*, 72 Tex. 87, 88, 10 S. W. 393. The question which was there excluded was plainly improper, because it violated the rule just stated, and called mainly for evidence of character. If one of the facts called for in the "sweeping question" asked would have fallen within our present holding, as it seems to us it would, it was so connected with objectionable matter that the court was not called upon to consider it separately, and it is plain, from the opinion, that it was not so considered. What the court said was inadmissible was evidence tending to show bad character. Where the evidence offered directly bears upon one of the elements of damage claimed, we know of no principle which excludes it.

For the error in the charge and in the exclusion of this evidence, the judgment must be reversed. The questions not discussed in this opinion were correctly disposed of by the Court of Civil Appeals.

Reversed and remanded.

REDINGTON v. HARRISBURG TRACTION CO.

(Supreme Court of Pennsylvania, Feb. 20, 1905.)

[60 Atl. Rep. 305.]

Street Railways—Duty to Prospective Passengers.*—It is the duty

*See *Foster v. Seattle Electric Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; foot-note appended to *Sharp v. New Orleans City R. Co.* (La.), 11 R. R. R. 668, 34 Am. & Eng. R. Cas., N. S., 668.

Redington v. Harrisburg Traction Co

conductor on a single-track road, before starting the car, to look on both sides of the car to see if passengers are about to enter. **Jury.**—In an action against a street railroad company for damages for personal injuries while attempting to enter a car, evidence held sufficient to take the case to the jury.

Appeal from Court of Common Pleas, Dauphin County.

Complaint by Susan Redington against the Harrisburg Traction Co. Judgment for plaintiff. Defendant appeals. Affirmed.

Defendant presented the following points:

It is an undisputed fact in this case that the car of the defendant which the plaintiff attempted to board had been stopped for the purpose of receiving a passenger on the other side of the street, and that neither the plaintiff nor her sister, who was with her, had signaled for the car to stop. As there is no evidence that either the motorman or conductor of the car had seen the plaintiff or her sister, or had any knowledge of their intention to board the car, it was not negligence to start the car in the usual way after the passenger for whom it had stopped had been received. The verdict must therefore be for the defendant. **Answer.** This point is refused.

It is undisputed that the plaintiff gave no signal of her intention to board the defendant's car, and that it was stopped for a passenger on the other side of the street, and that neither the conductor nor the motorman had any knowledge of her intention to become a passenger. It was therefore no negligence to start the car after the passenger for whom it had been stopped had been received, and the verdict must therefore be for the defendant. **Answer.** This assumes that no signal was given by the plaintiff. We think that it is for the jury to determine whether standing where the plaintiff said she stood was a signal.

There is no evidence in this case of negligence on the part of the defendant or its employees, and therefore the verdict must be for the defendant. **Answer.** Refused.

In view of the plaintiff's testimony that she had given no signal to stop the car, and that it had stopped for a passenger on the opposite side of the street, and the undisputed testimony that neither the conductor nor the motorman had any knowledge of her intention to become a passenger, it was not negligence for the motorman and conductor in charge of the car to start it as usual, and the verdict must be for the defendant. **Answer.** Refused.

Upon the plaintiff's own testimony, and all the testimony in the case, there is no evidence of negligence, and the verdict must be for the defendant. **Answer.** Refused.

The mere standing on a corner, or even in the street, without anything further, is not sufficient to notify the conductor of a street car that the person or persons so standing are intending to become passengers. **Answer.** This is refused. We

Reddington v. Harrisburg Traction Co

think the place where and the circumstances surrounding the standing must determine that question."

Verdict and judgment for plaintiff, for \$2,000.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles L. Bailey, Jr., and Le Roy J. Wolfe, for appellant.

W. M. Hargest, of *Hargest & Hargest*, for appellee.

POTTER, J. This is an action of trespass to recover damages for personal injuries received by the plaintiff while attempting to enter a car of the defendant company. The car had stopped at a street crossing to allow another passenger, who had signaled from the upper side of the street, to get on. After she was safely on, the car was started in the usual manner. But the railway was a single track, and the rear platform of the car was open to receive passengers from both sides; and it seems that the plaintiff and her sister were upon the other side, waiting to enter. They did not signal for the car to stop, but it did stop for the passengers upon the opposite side of the car; and the plaintiff assumed that she could enter from the side upon which she was standing, and while in the act of mounting the steps the car was started, and she was thrown to the ground. Evidently the conductor did not see the plaintiff, and was not aware that she was in the act of stepping on the car when he gave the signal to the motorman to go ahead. But it was his duty to have seen her. The company had invited her to enter from either side of the car, so that it cannot be said that she was entering from the wrong side, or from a place where the conductor had no reason to expect a passenger to be. If this had been a double-track road, where passengers were universally expected to get on and off at the right-hand side of the rear platform, the conductor might have been excused for presuming that passengers would enter from one side only. But under the circumstances he was bound to look for the entry of passengers from both sides. Much has been said in the argument for the appellant about the lack of any signal by the plaintiff to indicate as the car approached that she wanted to board it. Her failure to signal might have excused the men in control of the car, had they failed to stop. But the car was stopped for one passenger upon the other side, and, having thus stopped the car at a street crossing, where passengers were to be expected to get on, it was the duty of the conductor to give sufficient time to all persons who might wish to enter the car to do so in safety. He had no more right to imperil the safety of an intending passenger upon one side of the car than upon the other. The negligence of the conductor consisted in his failure to look on both sides of the rear platform before he gave the signal for the car to start.

The trial judge very properly instructed the jury that, if the plaintiff attempted to get on the car while it was in motion, she was guilty of contributory negligence, and could not recover. So

Weaver v. Ann Arbor R. Co.

The verdict must be taken as establishing the contention of the plaintiff that the car was started after she had one foot on the platform, and before she was safely on the platform, and that the premature starting of the car threw her to the ground, and resulted in her injury. Under the medical testimony it was, however, extremely doubtful if the serious trouble of which she complained, could be justly charged to this accident. The physicians testified squarely that her condition was not the result of the accident, but was a long-standing trouble. The physicians did not go beyond saying that her fall may have caused a recurrence of the old trouble. So that, in so far as this aspect of the case was concerned, the jury could only have been misled at the seriousness of the effect of the fall. The trial judge might very properly have cautioned the jury in this regard, and have called their attention to the meagerness of the testimony tending to show that this accident affected in any serious way the permanent trouble from which the plaintiff had admittedly suffered before that time. The physician who examined her shortly after the accident testified that she was suffering from a condition which had existed for years, and which could have been cured by an operation. However, no specific reference for instructions covering this feature were made by the court at the trial, nor is the inadequacy of the charge in this respect here assigned for error.

Assignments which are presented are overruled, and the verdict is affirmed.

WEAVER v. ANN ARBOR R. CO.

(Supreme Court of Michigan, April 4, 1905.)

[102 N. W. Rep. 1037.]

Carrier—Person in Charge of Stock—Construction of Contract.—A contract for the shipment of cattle provided for the carrying of a person in charge of the stock, and on the back of the bill it was provided that agents would permit only the names of "fide employees" accompanying the stock to be entered on the bill, so as to secure carriage for such person, the phrase "fide employees" meant persons actually in charge of the stock, and came within such description, though he had never been employed before the occasion, and though there had been no agreement for compensation in money by the shipper.

Same.—In an action against a railroad company for the death of one killed while being carried in charge of a shipment of cattle, evidence held to warrant a finding that deceased was actually in charge of the cattle by the shipper.

Same—Limiting Liability.*—One riding upon a drover's seat as a passenger for hire, and his release of liability for damages on account of negligence of the carrier is invalid.

*Notes appended to *Feldschneider v. Chicago, etc., Ry. Co.*, 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; *Long v. Valley R. Co. (C. C. A.)*, 12 R. R. R. 508, 35 Am. & Eng. R. Cas., 508.

Weaver v. Ann Arbor R. Co

Error to Circuit Court, Gratiot County; George P. Stone, Judge.

Action by Lizzie Weaver, administratrix of the estate of John H. Weaver, deceased, against the Ann Arbor Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before MCALVAY, GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ.

T. W. Whitney (*Alexander L. Smith*, of counsel), for appellant.

Julius B. Kirby, for appellee.

BLAIR, J. This writ of error is prosecuted to reverse a judgment of the circuit court of Gratiot county in favor of the plaintiff, as administratrix of the estate of John H. Weaver, deceased, in an action brought against the defendant railway company for injuries received by said decedent, caused by the negligence of the defendant, and from which he subsequently died. The action was brought under the survival act. At the close of the plaintiff's evidence defendant made a motion for a verdict on the pleadings and proofs, which the court overruled, and defendant excepted. The defendant offered no testimony. The case was thereupon submitted to a jury, which returned a verdict for plaintiff, on which judgment was entered. There is no dispute about the facts in the case. The errors assigned are the action of the court in overruling the motion above mentioned, in refusing to give in the charge to the jury two requests of the defendant, and error in the charge as given.

Plaintiff's decedent, John H. Weaver, was at the time of the accident causing his death being transported on a freight train of defendant, which was at said time standing within what are known as "yard limits" of the station at Ashley, a village on the line of the defendant railroad. He was in the caboose at the rear of said train, which was a south-bound train, known as "No. 33." The accident occurred shortly before midnight on the 29th of January, 1904. The accident was caused by another south-bound freight train of defendant, known as "No. 41," coming into the yard or station limits at Ashley, and running into the caboose in which plaintiff was, wrecking that car, and causing a hay car in front of it to be derailed and upset upon plaintiff's body, injuring him so severely that he died within a short time thereafter. The accident was due to the negligence of the engineer of train No. 41 in failing to keep his train under control when coming into yard or station limits, as required by a rule of the company.

The declaration avers that plaintiff's intestate was being transported as a passenger for hire. In proof of this allegation there was offered in evidence of the right of said Weaver as a passenger on defendant's train a paper found upon his body after

Weaver v. Ann Arbor R. Co

b. This document is designated a "limited liability live contract." It was a written contract entered into by the company and certain shippers of live stock, Messrs. Arg & Van Buskirk, providing for the transportation of 28 cattle from Ithaca, Mich., to Black Rock (near Buffalo), Ithaca is a station on the defendant's railroad a short north of Ashley. Under the contract the shippers had to accompany, or have an employee accompany, the stock to take care of the same. The transportation of the man was without other money consideration than the sum for the transportation of the stock. The contract contained, among others, the following provisions:

That the said shipper is, at his own sole risk and expense, to take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to the same, and neither said carrier nor any connecting carriers to be under any liability or duty with reference thereto, in the actual transportation of the same. That said shipper shall see that all doors and openings in said car or cars are all times so closed and fastened as to prevent the escape of any of said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of said stock from said car or cars. That no claim for damages which may accrue to the said shipper under this contract shall be made or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be in writing, verified by the affidavit of the said shipper or his agent, etc. And it is further agreed by said shipper that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier and its connecting carriers without charge other than the freight paid or to be paid for the transportation of the live stock in which he is, the said shipper shall and will indemnify and hold harmless said carrier and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier or any of its or their employees, or otherwise. And Altenburg & Van Buskirk does hereby acknowledge that he had the benefit of shipping the above described live stock at a higher freight according to the official tariffs, classifications and regulations of the said carrier and connecting carriers, and thereby releases the security of the liability of the said carrier and connecting carriers, and transportation companies as common carriers of the said live stock upon their respective roads and that he has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned. Ann Arbor Railroad Company, By E. W. Angell, Station Agent. Witness my hand, Altenburg & Van Buskirk, Shipper. By _____, Shipper's Agent.

Weaver v. Ann Arbor R. Co

"E. W. Angell, witness.

"(See back for release for man in charge.)"

Upon the back of the contract appeared the following:

"Form 258. Live stock contract:

"From Ithaca, Mich., to Black Rock, N. Y., via M. C. R. R.

"Date, Jan'y 29th, '04. Shipper, Altenburg & Van B.; consignee, do., ac Bun. W. B. Nos. M. C. 31 and M. C. 32; car Nos., M. C. 7991, T. C. S. D. 20836.

"Parties actually in charge of and accompanying within named stock are required to write their own names in ink here.

"John Weaver.

"Men in charge have written their own names above.

"E. W. Angell, Forwarding Agent.

"Ithaca, Mich., Station.

"Note—Agents will permit only the signature of owners or bona fide employees, who accompany the stock, to be entered on back of contract, without regard to passes allowed by number of cars, and run a pen through the remaining lines.

"John Weaver.

"I hereby sign my name as a means of identifying myself as original signer of this contract.

"John Weaver.

"Agents will fill in the blank spaces in face of contract in accordance with rates, weights, and conditions, as provided in tariffs and classifications, or such instructions as may be issued from time to time.

"The names of persons who are actually entitled to pass free with stock must be entered on the waybill, and which, when certified to by the agent, is the authority for the conductor to pass them.

"No return passes will be given.

"Agents will permit only the names of owners, or bona fide employees who accompany the stock, to be entered on waybill, without regard to passage allowed by number of cars.

"Agents are expected to adhere strictly to the rules in regard to the loading of mixed cars of stock, checking of shipments, examination of cars and doors, and the affording of proper facilities for the care of stock to parties in charge of same.

"This contract must be signed in duplicate in all cases; the shipper to

"Release for man or men in charge.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock I am in charge, the undersigned do hereby voluntarily assume all risk of accidents or damage to his person or property, and do hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature, and description, for

Weaver v. Ann Arbor R. Co

account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carrier or any of its or their employees, or otherwise.

"John H. Weaver,

"Signature of man in charge.

W. Angell, witness."

Defendant contends that: "John Weaver was not a passenger, as claimed by plaintiff. In fact and law he was a trespasser, to whom defendant owed no duty except to refrain from injuring him by wanton or willful acts. The contract conferred by plaintiff as the evidence of his right to be carried as a passenger contained, in the very paragraph signed by defendant, a provision that it was intended only for bona fide employees. And in this paragraph, as well as in the release signed by defendant, the validity of which we shall discuss further on, he, in fact, represents and certifies that he is a bona fide employee of the shippers, in charge of their stock. That such was not the fact is well known to him and the shippers. It was not known to the railroad company's agent. And, if it had been, the contract, on its face, shows that the agent was authorized to issue the pass only to bona fide employees of the shippers. In fact, the whole transaction was a fraud on the company. The privilege of sending a 'man in charge' was abused by sending instead a man who was not in charge of the stock, and had no connection with the shippers. Weaver was, for the purpose of getting a ride on the train, pretending (with the connivance of the shippers) to be a bona fide employee of the shippers, in charge of their stock. Under these circumstances he had no right to the transportation. He was therefore wrongfully on the train. In other words, he was a trespasser. And, irrespective of the release signed by him, the company is not liable."

Plaintiff does not think the trial judge erred in refusing to direct a verdict for defendant on the ground that Weaver was a trespasser.

The contract relied upon was between Altenburg & Van Hook as shippers and the railroad company as carrier, and intended to be signed by both parties. It was signed by the railroad company, by its station agent, and purported to have been signed by the shippers, although Mr. Altenburg testified that he never saw it, and had never read it, and there was no evidence, so far as the record shows, who did sign the shippers' names. The contract between the shippers and the carrier was all set forth on the face of the paper, appears to be complete, and contains no reference to anything upon the back thereof. There is no provision in this contract, as signed, requiring that the person accompanying the stock shall be a "bona fide employee" of the shippers. It gave them the right to select whomsoever they desired and send him in charge of the stock, in consideration of indemnifying the carrier against liability for injuries resulting from the person so placed in charge. It was manifestly the

Weaver v. Ann Arbor R. Co

shipper who assumed all of the risk of an improper selection, and not the carrier. *Heller v. Chicago, etc., Ry. Co.*, 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541.

The provisions with reference to "bona fide employees" are all upon the back of the agreement, not included in the agreement signed by the shippers, either explicitly or by reference, and are, in form, directions or instructions to the carrier's agent. Although one of these clauses was apparently signed by John Weaver, an inspection of the original in the return to the writ shows that it was not contemplated that it should be signed by him. Evidently the only clauses which it was intended that Weaver should sign were the two clauses reading, as follows: "Parties actually in charge of and accompanying within-named stock are required to write their own names in ink here." "I hereby sign my name as a means of identifying myself as original signer of this contract." These instructions to the carrier's agent seem to be designed for the protection of the company by insuring that the person who received a pass should be the person actually in charge of and accompanying the stock. The words "bona fide employees," as used in the instructions to the agent, mean the same thing as the expression, "Parties actually in charge of and accompanying within-named stock." The word "employee" has a variety of meanings, according to the context, subject-matter, and circumstances in which it is used. According to Webster, an employee is "one who is employed." According to the text of the Am. & Eng. Ency. of Law, vol. 11, p. 1: "To employ means to engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; when used passively, it sometimes has a reflexive meaning, signifying only to be engaged in. To select; to designate." In *Reg. v. Reason*, 23 L. J. Rep. (New Series) part 3, p. 11, it was held that if a person, while engaged in gratuitously assisting a postmaster, at his request, in sorting the letters, steal one of them, he is liable to the severer penalties imposed by the statute as a person employed under the post office. In the case of *Reg. v. Foulkes*, L. R. C. C. R. vol. 2, p. 150, the prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence, the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board, and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use. Held, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement. It was not necessary in this case that Weaver should have been employed before the

Weaver v. Ann Arbor R. Co

in question; nor was it necessary that there should have been any compensation in money provided for. It was sufficient that he was actually put in charge of the stock with the understanding that he should render such services as should be necessary in consideration of the transportation furnished.

If this was substantially the transaction between Weaver and the shippers, then he was a bona fide employee in the sense in which those words are used on the back of the contract.

Defendant's counsel regarded this inquiry as foreclosed by the testimony of Altenburg, who was called as a witness by plaintiff, who testified that Weaver was not in his employ or the employ of Altenburg & Van Buskirk at any time during his lifetime; that he came to him a perfect stranger, and told him he wanted a pass to Buffalo; that on learning he was the son of Dan Weaver, a friend of Altenburg's, he gave him the pass simply as to his father; that they had not been in the habit of sending a caretaker with their cattle, because it was unnecessary; that he told one of the defendant's agents at the depot to give Weaver a pass; that he expected that, if anything happened to the stock, Weaver would take hold and help, if called upon, but did not think he would be called upon because of the light load. It appeared also from the testimony of Altenburg and others that Weaver put on two suits of clothes when he left home, and threw his overalls over them; that he got to the stockyards about 10 o'clock in the forenoon, and worked from then until 3 o'clock in the afternoon, at which time the loading of the stock was finished; that he told the conductor that he was in charge of the stock, and he signed the statement that he was in charge of the stock, and the agent authenticated it; that he had his overalls on when he was killed. Altenburg testified that Weaver was not called upon to help load the stock; but he did help load it, and thereby showed his understanding that he was to earn his pass by doing whatever needed to be done about the stock. Altenburg was notified by defendant's attorney that the railroad company would look to Altenburg & Van Buskirk to indemnify them for any damages on account of the death of Weaver, and the jury were entitled to view his testimony in the light of his manifest interest, and to reject some parts of it and accept others. It is not to be said that there was evidence from which the jury might have concluded that Weaver was actually placed in charge of the stock by Altenburg, with the understanding that he should do whatever was necessary to be done in caring for them; and the trial judge was not to be faulted for not having been warranted in taking this question from the jury.

In any event, defendant's counsel contend: That the railroad company is not liable because the release signed by plaintiff's father was a valid and binding contract, and absolved the company from liability. That, whatever the law may be in other jurisdictions, it is the settled law in Michigan that railway companies are not common carriers of live stock. They are not bound to

Weaver v. Ann Arbor R. Co

perform the service of carrying live stock. Nor does the fact that they do in fact carry such stock under special contracts, such as the one in this case, make them common carriers. That if the railway company, in making the contract in question here, was not acting in the capacity of a common carrier, the whole argument against the validity of the release necessarily falls to the ground; for if it was contracting to do a service which it was not bound by law to do in any event, clearly it had the right to impose such conditions as it saw fit upon the performance of the service, and the agreement of the shippers to indemnify it against, and of Weaver to release it from, liability for injuries to the latter caused by the negligence of the company's employees, is entirely valid—citing *Railroad Co. v. McDonough*, 21 Mich. 165, 193, 4 Am. Rep. 466; *Ry. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275; *Heller v. Ry. Co.*, 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541; *McKenzie v. Ry. Co.* (Mich.) 100 N. W. 260; *Coup v. Wabash R. R. Co.*, 56 Mich. 111, 115, 22 N. W. 215, 56 Am. Rep. 374; *Mann v. P. M. R. R. Co.* (Mich.) 97 N. W. 721; *Wilson v. At. Coast Line R. Co.* (C. C.) 129 Fed. 774, 783; *B. & O. R. R. Co. v. Voight*, 176 U. S. 498, 514, 20 Sup. Ct. 385, 44 L. Ed. 560; *Russell v. Pittsburg, etc., Ry. Co.*, 157 Ind. 305, 316, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214. Plaintiff's counsel does not claim, in support of the judgment in this case, that the defendant was a common carrier of live stock, but contends that as to the plaintiff's intestate defendant was a common carrier of passengers, and therefore, upon grounds of public policy, it could not lawfully stipulate for exemption from responsibility for its own negligence. In our opinion, the contention of plaintiff's counsel must be sustained. This precise question was exhaustively considered and discussed by Mr. Justice Bradley in the case of *N. Y. Central R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. In an opinion of great force and clearness of reasoning, concurred in by the entire court, it was held that the plaintiff, riding upon a stock drover's pass, as in the present case, was a passenger for hire, and the release of liability for damages on account of negligence of the carrier was invalid. The same rule is adopted in Illinois. "It is said, however, that in Illinois a carrier may by contract limit its liability for all negligence except gross negligence. This rule has been laid down in some cases in reference to the shipment and carriage of property, but does not apply when a carrier intends to limit its liability for personal injury to a passenger paying fare. Where a passenger was traveling in the cars of a railroad company upon a free pass given him by the company, and received injuries to his person, it has been held that a contract exempting it from liability for any other species or degree of negligence than gross negligence was valid. *Illinois Central Railroad Co. v. Read*, 37 Ill. 484 [87 Am. Dec. 260]; *Toledo, Wabash & Western Railway Co. v. Beggs*, 85 Ill. 80 [28 Am. Rep. 613]. But in the present case it cannot be said that the deceased

Weaver v. Ann Arbor R. Co

he was riding upon a free pass. 'A person who is traveling with the consent of the railroad company, upon a freight in charge of stock or goods carried by the company for a passenger. *I. B. & W. Ry. Co. v. Beaver*, 41 Ind. 493; *W. C. St. P., M. & O. R. R. Co.*, 64 Wis. 447 [24 N. W. Am. Rep. 634]. Even where such a person is traveling in charge of cattle on a drover's pass, he is a passenger for hire. Consideration for his passage is the service he renders in care of the cattle, or the charge made against him or his owner for shipping the cattle. *Railroad Co. v. Lockwood*, 111 Ill. 357 [21 L. Ed. 627]; *Indianapolis, etc., Railroad Co. v. ...*, 93 U. S. 291 [23 L. Ed. 898]; *C. P. & A. R. R. Co. v. ...*, 19 Ohio St. 1 [2 Am. Rep. 362]; 3 Am. & Eng. Ency., p. 16, and cases cited in notes; *Lake Shore & Michigan Southern Railroad Co. v. Brown*, 123 Ill. 162 [14 N. E. 197, 5 Am. Rep. 510]. New York, Chicago & St. Louis Railroad v. Blumenthal, 160 Ill. 40 [43 N. E. 809]." *I. C. R. R. Co. v. ...*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 53. Many authorities are cited in support of the doctrine in the plaintiff's briefs, and we are satisfied that it has in its support that weight of reason and authority. The cases of *Railway Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, *Russell v. Pittsburg, etc., Ry. Co.*, 157 Ind. 305, 61 N. E. 126, 43 L. R. A. 253, 87 Am. St. Rep. 214, upon which defendant's counsel strongly rely, are, in our opinion, fatal to his contention. The case of *Ry. Co. v. Voight* distinctly recognizes and distinguishes the *Lockwood Case*, and distinguishes the case under consideration from that case, and therefore from the case in *Lockwood*. It was held that *Voight* was not a passenger, while *Lockwood* was. So in the case of *Russell v. Pittsburg, etc., Ry. Co.* the court fully recognize the validity of the rule adopted in the *Lockwood Case* and approved in Indiana in numerous cases. In other cases the court quotes from its own decision in *Lockwood, etc., R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869, in which the plaintiff "was a passenger at the time he suffered the injury complained of, and was occupying a seat in a caboose attached to a freight train in which he was transporting a carload of cattle. While the train on which he was being carried was ascending a steep grade, a number of the cars, including the car in which the plaintiff and others were seated, became detached from the engine and the forward part of the train," collided with the following engine, and plaintiff was severely injured. The court set up, among other things, "that at the time of the injury complained of the plaintiff was in charge of a carload of cattle, and was riding under a contract, in which it was stipulated that, in consideration of a free pass and other valuable considerations, the company was to be exempt from any liability for injury which the plaintiff might sustain while in charge of the cattle." The court held that: "A stipulation that the carrier is not to be bound to the exercise of care and diligence is, in

Hancock v. Louisville & N. R. Co

effect, an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void." But the principal case under consideration now distinguishes this case and the Lockwood Case and others, and holds that the Pullman car porter "did not occupy the position of an ordinary passenger upon appellee's train." The Voight Case and the Russell Case sustain the rule contended for by plaintiff's counsel that Weaver was a passenger for hire, as to whom defendant occupied the position of a common carrier of passengers, but as to express messengers and Pullman car porters the rule is different.

We find no errors in the rulings of the trial judge, and the judgment is affirmed.

HANCOCK v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, March 3, 1905.)

[85 S. W. Rep. 210.]

Carriers—Railroads—Passenger Tickets—Right of Passenger.*—

A passenger purchasing a ticket for transportation to a station on the carrier's line contracts to take his passage on a train scheduled to stop at that point, and he cannot, on boarding a train not scheduled to stop there, compel the conductor to accept the ticket, or recover damages for being ejected from the train.

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by J. L. Hancock against the Louisville & Nashville Railroad Company. From a judgment directing a nonsuit, plaintiff appeals. Affirmed.

Gordon, Gordon & Cox, for appellant.

Benjamin D. Warfield and *C. J. Waddell*, for appellee.

O'REAR, J. Appellant bought a ticket for a continuous passage over appellee's railroad from Clarksville, Tenn., to Slaughter Station, in Hopkins county, Ky. Clarksville and Slaughter are on different branches of appellee's system, necessitating a change of cars by passengers between those points at Guthrie. When appellant arrived at Guthrie, he left that train, and had to

*See foot-notes appended to *Marx v. Louisiana Western R. Co.* (La.), 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635.

Hancock v. Louisville

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Hancock v. Louisville & N. R. Co.

effect, an agreement to absolve him from duties of his employment, and it would be object of the law to permit the carrier liability by a stipulation in his contract latter should take the risk of the negl his servants. The law will not allow his obligation to the public, and amount to a denial or repudiation essence of his employment will trary to public policy, and th case under consideration ne

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We find no err

judgment is affir

ant to Transfer Company—Exclus ive
-Standing Hacks, etc.—Rights of Con-
pany organized under the act of April 3,
03, now sections 3446 to 3452, Rev. St. 1892,
to a transfer company the exclusive right to
of its depot grounds for the purpose of
hacks and vehicles, and of soliciting thereon the
ing passengers; and a rule of said depot company
from all others engaged in a like business, except for
delivering passengers or of receiving passengers who
previously employed them, is a reasonable rule, and may
so long as said transfer company provides and furnishes
adequate accommodations in the way of vehicles to
reasonable requirements of the traveling public, and shall
greater charge for its services in carrying passengers and
to and from such station than is made or may be permitted
made by others for like services.
abus by the Court.)

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error to Circuit Court, Franklin County.

Quo warranto by the state, on relation of Attorney General
sheets, against the Union Depot Company. Judgment for de-
endant, and plaintiff brings error. Affirmed.

Wade H. Ellis, Atty. Gen. (Edgar B. Kinkhead, of counsel), for
plaintiff in error.

Joseph Olds and W. O. Henderson, for defendant in error.

CREW, J. We learn from the record in this case that in Au-
gust, 1872, the defendant in error was incorporated and organized
as a union depot company under the act of April 3, 1868 (65
Ohio Laws, p. 63), by the Cleveland, Columbus, Cincinnati &
Indianapolis Railway Company and the Pittsburgh, Cincinnati &
St. Louis Railway Company. About 1873 said depot company
became the owner in fee of the tract of land in the city of Co-
lumbus abutting on High street, upon which its union station and
railroad are constructed. Prior to 1892 said station and railroad

*See foot-note appended to Hedding v. Gallagher (N. H.), 12 R.
R. R. 91, 35 Am. & Eng. R. Cas., N. S., 91.

1. Sheets v. Union Depot Co

were at grade with High street, and at 1892 and 1893 the city of Columbus, Ohio, by ordinance, laid out a street, adjacent to said property, crossing said street; thereby forming a viaduct adjacent to said station. Thereafter the Union Depot Company, forming the approach to said station, could be used in connection with said grade from, said viaduct; and in August, 1897. The dimensions of said way and concourse are such that to accommodate thereon more than ten passenger cars or carriages, and two or three baggage cars at the same time. The Columbus Transfer Company engaged in the hack and transfer business at Columbus, and in carrying passengers and baggage to and from said union station. On July 15, 1899, the Union Depot Company, in error, made and entered into a written contract and agreement with the said Columbus Transfer Company, which contract is as follows:

"This agreement made this fifteenth day of July, in the year eighteen hundred and ninety-nine, between the Union Depot Company, as first party, and the Columbus Transfer Company, of Columbus, Ohio, as second party.

"Witnesseth that the first party demises and leases to the second party the exclusive privilege of soliciting upon its premises the carrying of passengers and baggage from the union station, the property of said first party; in consideration of this, in addition to the stipulations hereinafter named the said second party agrees to provide a sufficient number of omnibuses, carriages, coupes and baggage wagons, to adequately provide for the accommodation of the traveling public, at all trains arriving, and at all hours of the day and night; the same to be kept and maintained in good order and condition. Said second party also agrees to make no greater charge for its services in carrying passengers and baggage than is or may be provided for in the ordinances of the city of Columbus relating thereto. The vehicles of said second party are to occupy such space on the concourse as may be designated by the station officers, and its employees at all times and in all respects shall be subject to the regulation and control of said officers.

"To hold the same unto the second party as tenant at will of the first party, and for the rent or sum of six hundred dollars (\$600.00) per annum to commence on the fifteenth day of July, A. D. 1899, and to be paid in monthly installments on the tenth day of the following month of each year during said tenancy.

"That said first party hereby reserves the right to terminate this agreement and the said tenancy, and to take possession of and re-enter upon said premises at any time hereafter, after hav-

Reddington v. Harrisburg Traction Co

think the place where and the circumstances surrounding the standing must determine that question."

Verdict and judgment for plaintiff, for \$2,000.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles L. Bailey, Jr., and Le Roy J. Wolfe, for appellant.
W. M. Hargest, of Hargest & Hargest, for appellee.

POTTER, J. This is an action of trespass to recover damages for personal injuries received by the plaintiff while attempting to enter a car of the defendant company. The car had stopped at a street crossing to allow another passenger, who had signaled from the upper side of the street, to get on. After she was safely on, the car was started in the usual manner. But the railway was a single track, and the rear platform of the car was open to receive passengers from both sides; and it seems that the plaintiff and her sister were upon the other side, waiting to enter. They did not signal for the car to stop, but it did stop for the passengers upon the opposite side of the car; and the plaintiff assumed that she could enter from the side upon which she was standing, and while in the act of mounting the steps the car was started, and she was thrown to the ground. Evidently the conductor did not see the plaintiff, and was not aware that she was in the act of stepping on the car when he gave the signal to the motorman to go ahead. But it was his duty to have seen her. The company had invited her to enter from either side of the car, so that it cannot be said that she was entering from the wrong side, or from a place where the conductor had no reason to expect a passenger to be. If this had been a double-track road, where passengers were universally expected to get on and off at the right-hand side of the rear platform, the conductor might have been excused for presuming that passengers would enter from one side only. But under the circumstances he was bound to look for the entry of passengers from both sides. Much has been said in the argument for the appellant about the lack of any signal by the plaintiff to indicate as the car approached that she wanted to board it. Her failure to signal might have excused the men in control of the car, had they failed to stop. But the car was stopped for one passenger upon the other side, and, having thus stopped the car at a street crossing, where passengers were to be expected to get on, it was the duty of the conductor to give sufficient time to all persons who might wish to enter the car to do so in safety. He had no more right to imperil the safety of an intending passenger upon one side of the car than upon the other. The negligence of the conductor consisted in his failure to look on both sides of the rear platform before he gave the signal for the car to start.

The trial judge very properly instructed the jury that, if the plaintiff attempted to get on the car while it was in motion, she was guilty of contributory negligence, and could not recover. So

Weaver v. Ann Arbor R. Co

verdict must be taken as establishing the contention of plaintiff that the car was started after she had one foot on it, and before she was safely on the platform, and that premature starting of the car threw her to the ground, and was the cause of her injury. Under the medical testimony it was, extremely doubtful if the serious trouble of which she complained, could be justly charged to this accident. The physicians testified squarely that her condition was not the result of the accident, but was a long-standing trouble. The physicians did not go beyond saying that her fall may have been a recurrence of the old trouble. So that, in so far as this case was concerned, the jury could only have judged of the seriousness of the effect of the fall. The trial judge might very properly have cautioned the jury in this regard, and called their attention to the meagerness of the testimony tending to show that this accident affected in any serious way a permanent trouble from which the plaintiff had admitted suffering before that time. The physician who examined her shortly after the accident testified that she was suffering from a condition which had existed for years, and which could not have been cured by an operation. However, no specific request for instructions covering this feature were made by the plaintiff at the trial, nor is the inadequacy of the charge in this respect here assigned for error. The assignments which are presented are overruled, and the judgment is affirmed.

WEAVER v. ANN ARBOR R. CO.

(Supreme Court of Michigan, April 4, 1905.)

[102 N. W. Rep. 1037.]

Person in Charge of Stock—Construction of Contract.—A contract for the shipment of cattle provided for the carriage of a person in charge of the stock, and on the back of the bill it was provided that agents would permit only the names of "free employees" accompanying the stock to be entered on the bill, so as to secure carriage for such person, the phrase "free employees" meant persons actually in charge of the stock, and came within such description, though he had never been employed before the occasion, and though there had been no agreement for compensation in money by the shipper.

Same.—In an action against a railroad company for the death of one killed while being carried in charge of a shipment of cattle, evidence held to warrant a finding that deceased was actually in charge of the cattle by the shipper.

Same—Limiting Liability.*—One riding upon a drover's horse as a passenger for hire, and his release of liability for damages on account of negligence of the carrier is invalid.

Notes appended to *Feldschneider v. Chicago, etc., Ry. Co.*, 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; *Long v. Valley R. Co.* (C. C. A.), 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508.

State ex rel. Sheets v. Union Depot Co

will be found, among others, the following cases: *New York, etc., Railroad Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; *Boston & Albany Railroad Co. v. Brown*, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418; *Old Colony Railway Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *Norfolk & Western Ry. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *New York, etc., Railway Co. v. Bork*, 23 R. I. 218, 49 Atl. 965; *N. Y. Central, etc., Railroad Co. v. Flynn et al.*, 74 Hun, 124, 26 N. Y. Supp. 859; *Brown v. N. Y. Central, etc., Railroad Co.*, 75 Hun, 355, 27 N. Y. Supp. 69; *Barney v. The D. R. Martin*, 11 Blatchf. 233, Fed. Cas. No. 1,030.

In *Old Colony Railway Co. v. Tripp*, supra, Allen, J., says in the opinion: "We have not been referred to any decision or dictum in England or in this country that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers, or that a regulation of the company which allows such use by particular persons and denies it to others violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to use its station grounds and buildings."

A comparatively recent case, and one involving the identical question involved in the present case, is that of *Donovan v. Pennsylvania Co.*, 120 Fed. 215, decided by the Circuit Court of Appeals of the Seventh Circuit in 1903, in which it would seem the court had before it most or all of the adjudicated cases bearing upon this question. The syllabus of that case is as follows: "A railroad company is under no duty, as a common carrier, to permit hackmen to enter its stations for the purpose of soliciting business from its passengers, and therefore its granting of such right to one person or concern does not entitle others to equal privileges on the same terms." The following is from the opinion in that case by Baker, Circuit Judge: "Appellee has a contract with the Parmelee Transfer Company, under which two agents of the transfer company are stationed within the depot building to solicit the custom of passengers. Those appellants who are hackmen have continuously asserted the right, over appellee's repeated objections, to have two of their number enter the building to solicit custom, and have acted accordingly, and threaten to continue. These appellants who are not hackmen claim no right

State ex rel. Sheets v. Union Depot Co

to enter appellee's building for the purpose of plying their trades. The question on this branch of the case is the right of the hackmen to solicit business within the station over appellee's protest. That appellee may exclude all hackmen is not denied. But it is insisted that appellee may not lawfully give an exclusive privilege to one hackman; that, by granting the privilege to one, it has waived its right of exclusion; and that its only remaining right is to promulgate and enforce reasonable rules and regulations under which all hackmen, without discrimination, shall be afforded equal facilities in soliciting patronage within the station. [Citing many authorities pro and con.] The asserted right of the hackmen necessarily postulates a correlative duty on the part of the railroad company. The company owes the duty to all persons, without discrimination, to carry them on equal terms of service and compensation. As a common carrier of passengers, the company must provide facilities for the reception, carriage, and discharge of its passengers, and must establish rates which are available equally to all who desire to become passengers. But the company does not owe to its passengers the duty to provide on its trains the opportunities for them to purchase newspapers, books, fruit, and the like, or to employ the services of a stenographer or of a barber, or to buy cab or express tickets. Much less does it owe the duty to any one to permit him to pursue his vocation on the trains. And if not on the trains, then not in the station buildings. The relation of carrier and passenger continues not merely on the train, but within the station at the end of the journey. The right of way on which the trains run, and the lands on which the depots are built, were obtained and are held for purposes of the same general character. The fact that the person who asserts the right to carry on his business for his own profit upon the trains or within the station buildings is himself a common carrier does not affect the question."

In the case at bar it cannot be said that the Union Depot Company has granted to the Columbus Transfer Company the exclusive privilege of using or occupying its driveway or concourse, or the exclusive right to carry passengers and baggage to and from its station; but the license or privilege so granted is, as we have seen, subject to the right of all other persons or companies to use said driveway or concourse for the purpose of delivering passengers or of receiving passengers who have previously employed them. The only exclusive privilege given the transfer company is the privilege of soliciting on the premises of said depot company the carrying of passengers and baggage. The Union Depot Company has, and may rightfully exercise over its station and depot grounds, all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise. This court has said in *Pittsburg, Ft. Wayne & Chicago Railway Co. v. Bingham*, Adm'x, 29 Ohio St. 370, 371: "For all purposes, not connected with the operation of its road, the right of the company to the exclusive use

Hart v. State

and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes. * * * It is doubtless true that a railroad company, by erecting station houses and opening them to the public, impliedly licenses all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road or with its servants or agents." Upon the undisputed facts of the case now before us, we are of opinion that the contract made and the rule or regulation adopted by the Union Depot Company were and are reasonable in character, and such as the depot company had the lawful right to make and adopt. Until such time, then, as it can be shown that the depot company is exercising its powers in bad faith, or to the disadvantage, hurt, or oppression of the public, the state may not, we think, rightfully question its action.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur. SUMMERS, J., not sitting.

HART v. STATE.

(Court of Appeals of Maryland, March 22, 1905.)

[60 Atl. Rep. 457.]

Carriers—Interstate Carriage of Passengers—Statutes—Separate Coaches for White and Colored Persons—Constitutionality.*—Though Acts 1904, p. 186, c. 109, requiring carriers to provide separate coaches for the transportation of white and colored passengers, and making it an offense for a passenger to refuse to occupy the car to which he is assigned by the conductor, is valid in so far as it affects commerce wholly within the state, it is invalid as to interstate passengers under the commerce clause of the federal Constitution.

Appeal from Circuit Court, Cecil County.

William H. H. Hart was convicted of refusing to occupy a car and compartment to which he had been assigned by the conductor on the train on which he was riding, pursuant to Acts 1904, p. 186, c. 109, and he appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

Henry M. McCullough, for appellant.

Wm. S. Bryan, Atty. Gen., for the State.

BOYD, J. The appellant was indicted under the provisions of chapter 109, p. 186, of the Acts of 1904 of the General Assembly of Maryland, for refusing to occupy a car and compartment to

*See foot-note appended to *State v. Pearson* (La.), 8 R. R. R. 324, 31 Am. & Eng. R. Cas., N. S., 324.

Hart v. State

which he had been assigned by the conductor of the train on which he was riding. A demurrer to the indictment was filed by the traverser, which was overruled by the court, and he then filed a plea in abatement, which was demurred to by the state's attorney, and the demurrer was sustained. The traverser was then tried and convicted, and, after overruling a motion in arrest of judgment, the court imposed a fine of \$5 on him. From that judgment this appeal was taken.

The indictment charges that the appellant, being of the colored race, was a passenger on a train of the Philadelphia, Baltimore & Washington Railroad Company operating cars and coaches by steam upon its railroad in the state of Maryland, "on and under a ticket which he had purchased in the city of New York for continuous transportation therefrom by and over said railroad through the states of Pennsylvania and Delaware and said state of Maryland to the city of Washington." The plea goes more in detail, but it will not be necessary to quote from it. The specific question to be determined is whether the above-mentioned act of assembly is in conflict with that part of article 1, § 8, of the Constitution of the United States, known as the "Commerce Clause," in so far as that act affects interstate passengers.

Section 1 of the act provides: "That all railroad companies and corporations, and all persons running or operating cars or coaches by steam on any railroad line or track in the state of Maryland, for the transportation of passengers, are hereby required to provide separate cars or coaches for the travel and transportation of the white and colored passengers on their respective lines of railroad;" and then provides that a compartment of a car or coach, divided as therein stated, shall be deemed a separate car or coach within the meaning of the act. Section 2 prohibits any difference or discrimination in quality of, or convenience or accommodation in, the cars, etc. Section 3 imposes a fine of not less than \$300 nor more than \$1,000 upon the carrier for violation of the provisions of the act. Section 4 confers the right and imposes the duty upon conductors and managers to assign white and colored passengers to their respective cars, and provides that a passenger refusing to occupy the car to which he is assigned on indictment and conviction thereof may be fined not less than \$5 nor more than \$50, or confined in jail not less than 30 days, or both, in the discretion of the court. Section 5 imposes a fine on any conductor or manager failing or refusing to perform the duties imposed on him by section 4. Section 6 authorizes the conductor or manager in charge of the train to assign and set apart a portion of the car assigned to passengers of one color to those of the other color when the car intended for the latter is completely filled, if no extra car can be obtained, and the increased number of passengers could not be foreseen. Section 7 excepts from the operation of the act employees of railroads, nurses, officers in charge of prisoners, and the prisoners, transportation of passengers in caboose cars attached to freight

Hart v. State

trains, parlor and sleeping cars, and through express trains that do no local business.

It seems to be well settled that a common carrier has the power, in the absence of statutory provision, to adopt regulations providing separate accommodations for white and colored passengers, provided, of course, no discrimination is made. It was said in *West Chester & Philadelphia Railroad Company v. Miles*, 55 Pa. 209, 93 Am. Dec. 744, that prior to the act of March 22, 1867, declaring it an offense for railroad companies to make any distinction between passengers on account of race or color, "there was that natural, legal, and customary difference between the white and black races in this state which makes their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights, both of carriers and passengers." That was a suit by a colored woman, who had been ejected from a car for refusing to obey a rule of the company requiring conductors to make colored persons sit in one end of the car. The case, which was decided in favor of the plaintiff in the court below, was reversed by the Supreme Court of Pennsylvania. Justice Agnew, in delivering the opinion, said: "In order to preserve and enforce his [the conductor's] authority as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro take his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unjust it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterward the breach of the peace it may have caused." There are numerous cases to the same effect, many of which are cited in *Chilton v. St. Louis & I. M. R. Co.*, 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; *Smith v. Chamberlain*, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710; *Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639; *Bowie v. Birmingham Ry. & Electric Co.*, 125 Ala. 397, 27 South. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 247; and the notes to those cases, as reported in the L. R. A. series.

The Supreme Court of the United States has recognized that doctrine, and has also determined that a state statute requiring separate accommodations for white and colored persons is not contrary to the thirteenth or fourteenth amendments to the Constitution of the United States. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, affirming *Ex parte Plessy*, supra. Justice Brown, in delivering the opinion of the court, said the question was whether the statute was a reasonable regu-

Hart v. State

lation, and with respect to that there must be a large discretion given to the Legislature; that "in determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes, or even requires, the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of State Legislatures." The case last mentioned did not involve the question of interstate commerce, but was limited to the right of the state to require the carrier to provide separate accommodations for the two races within the state. This provision of the Constitution has been a fruitful source of litigation from the early days of our government to the present time. The line of demarkation between cases in which it has been held that the constitutional provision was violated by state statutes and those in which the contrary conclusion was reached cannot always be easily traced. It has often happened that the Supreme Court has been called upon to determine under this clause of the Constitution questions of a most delicate character. To sustain the necessary powers of the general government over interstate dealings without injuriously affecting the welfare of the people of the state is not always free from difficulty, and it is therefore not strange that apparently inconsistent positions have sometimes been taken. The power to regulate interstate commerce is undoubtedly vested exclusively in Congress, but the states may enact valid police laws, which merely incidentally affect such commerce, if they do not conflict with some act of Congress on the subject.

The Attorney General, in his brief filed in this case, states his contention to be "that the police regulations of a state, which are valid in themselves, and which have a real and substantial relation to any head of the police power, are binding upon persons and corporations engaged in interstate commerce," and that persons traveling through the state must comply with those regulations, which are enacted "for the purpose of furthering the public health, the public morals, the public convenience, or the public order." He conceded at the argument that, unless the statute now under consideration was within the police powers of the state, it was invalid in so far as it affected interstate passengers; and as that is undoubtedly so we must consider the question from that standpoint. It may be well at this point to recall some of the definitions or explanations of this term—"police powers of the states"—as given by the Supreme Court. It has spoken of it as a "power to enact laws to promote the order and to secure the comfort, happiness, and health of the people" (*Hennington v.*

Hart v. State

Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166); as "their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states" (Id.); "such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people" (Railroad Company v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853); "reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of the passengers and of the public" (Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064); and in *Lake Shore, etc., Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, it was held that "the power exists in each state by appropriate enactments not forbidden by its own or the federal Constitution to regulate the relative rights and duties of all persons and corporations within its jurisdiction, so as to provide for the public convenience and the public good," and "the power of the state by appropriate legislation to provide for the public convenience stands upon the same ground as its power by appropriate legislation to protect the public health, the public morals, or the public safety."

Justice Brown, in delivering the opinion in *C. & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, said: "The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the states cannot interfere at all." He said that within the second class are embraced laws for the regulation of pilots, quarantine and inspection laws, the policing of harbors, the improvement of navigable channels, the regulation of wharves, piers, and docks, the construction of dams and bridges across the navigable waters of a state, and the establishment of ferries. Other instances, more analogous to this case, in which state statutes have been upheld, although it was contended they were contrary to this clause of the Constitution, are those requiring engineers to undergo examination and obtain licenses from a state board of examiners before being permitted to run trains in the state (*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508); prohibiting any one from serving on railroad lines who was color-blind, or had defective vision (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); preventing freight trains from running on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166); forbidding heating passenger cars with stoves or furnaces (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853). Such legislation is sustained on the ground that a state has the

Hart v. State

right to adopt reasonable rules for the construction, management, and operation of railroads within its jurisdiction, designed to protect persons and property otherwise endangered by their use. "They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police powers of the state to regulate the relative rights and duties of all persons and corporations within its limits." *C., M. & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688.

Having seen that under the authorities a common carrier can itself adopt reasonable regulations for the separate accommodation of white and colored passengers, and that the states can lawfully enact laws requiring such separation so long as they are confined to intrastate commerce, and having gathered from the decisions of the Supreme Court such statements of the police powers of the states as show the nature of those general powers, it is incumbent upon us to see how far the Supreme Court has determined or indicated its views on the specific question now before us. The case of *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, is more applicable than any other we have found. The Supreme Court treated the statute involved in that case as requiring those engaged in interstate commerce to give all persons traveling in Louisiana equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, as the state court had so construed it. The court said that "state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress," and that that statute occupied that position. Chief Justice Waite, in delivering the opinion, said: "It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced." The Chief Justice added that: "It was to meet just such a case that the commercial clause in the Constitution was adopted. * * * If each state was at liberty to regulate the conduct of carriers while within its

Hart v. State

jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity of his business, and, to secure it, Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be." The Chief Justice quoted from Justice Field in *Welton v. Missouri*, 91 U. S. 282, 23 L. Ed. 347, that "inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled," and said that congressional inaction left the carrier "at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana, and, while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored persons in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress, and not from the states."

We have thus quoted at unusual length from that case, because it is relied on by the appellant as conclusive, and is sought to be distinguished from this case by the state. It must be admitted that there is unquestionably some distinction. But other decisions of the Supreme Court seem to intimate, although they do not definitely determine, that a law such as that now under consideration is unconstitutional, in so far as it is attempted to be applied to interstate passengers, and *Hall v. De Cuir* has often been cited, and much of the language used by the Chief Justice has been quoted from time to time in denying the right of states to interfere with interstate commerce. In *Railway Company v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, Justice Miller, after stating that in the cases of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, *C. B. & Q. R. R. v. Iowa*, 94 U. S. 155, 24 L. Ed.

Hart v. State

94, and *Peik v. Chicago & N. W. R. R. Co.*, 94 U. S. 164, 24 L. Ed. 97, some questions did not receive full consideration, said, in the headnotes prepared by him: "Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a statute of a state intended to regulate or to tax, or to impose any other restriction upon, the transmission of persons or property or telegraphic messages from one state to another is not within that class of legislation which the states may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the state." In that case the court quoted at length from the opinion in *Hall v. De Cuir* to sustain the doctrine announced. The Chief Justice and Justices Bradley and Gray dissented, but they distinguished it from *Hall v. De Cuir*. In *Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784, a statute of Mississippi requiring all railroads carrying passengers in that state (other than street railroads) to provide equal, but separate, accommodations for the white and colored races, was held to be within the powers of the state, and not a regulation of interstate commerce, as the Supreme Court of the state had held that it applied solely to commerce within the state. There the case of *Hall v. De Cuir* was again considered at length, and, after quoting from it, Justice Brown said: "So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by Congress alone." Again, he said: "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company, but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the powers of the state. No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers." In that case Justices Harlan and Bradley dissented on the ground that *Hall v. De Cuir* was applicable. In *Ches. & Ohio R. R. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244, the railway company was, as in the Mississippi Case, *supra*, indicted for violation of a similar law. The court said: "The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the state, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches

Hart v. State

when traveling from or to points in other states." The court added that "similar questions have arisen several times in this court," and then referred to *Hall v. De Cuir*, the *Mississippi Case*, and *Plessy v. Ferguson*. The language of the Kentucky statute was broad enough to include all railroads, but it was held that the decision of the Court of Appeals of that state, sustaining the constitutionality of the act on the ground that it only applied to transportation between points within the state, for, if not, that the regulation of such transportation is severable from that as to interstate business, constituted a determination of the local law which was binding on the Supreme Court. In that case the Supreme Court did not in so many words say that the law would have been unconstitutional if it had been construed to apply to interstate passengers, but it very strongly intimated it, and Justice Brown concluded the opinion by saying: "In view of the language above quoted from the *Lander Case*, it would be unbecoming for us to say that the Court of Appeals would not construe the law as applicable to domestic commerce alone, and, if it did, the case would fall directly within the *Mississippi Case*, 133 U. S. 587 [10 Sup. Ct. 348, 33 L. Ed. 784]. We therefore feel compelled to give it that construction ourselves, and, so construing it, there can be no doubt as to its constitutionality. *Plessy v. Ferguson*, 163 U. S. 537 [16 Sup. Ct. 1138, 41 L. Ed. 256]." In *Western Union Telegraph Company v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, the court, through Justice Peckham, repeated what we have quoted above from Justice Brown's opinion in *C. & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, and added: "When the subjects in regard to which the laws are enacted, instead of being of a local nature affecting interstate commerce but incidentally, are national in their character, then the nonaction of Congress indicates its will that such commerce shall be free and untrammelled." And again: "Legislation which is a mere aid to commerce may be enacted by a state, although at the same time it may incidentally affect commerce itself. *Mobile County v. Kimball*, 102 U. S. 691 [26 L. Ed. 238]. On the other hand, the state statute, which only assumed to regulate those engaged in interstate commerce while passing through the particular state, has been held void because it in effect and necessarily regulated and controlled the conduct of such persons throughout the entire voyage, which stretched through several states. Such is the case of *Hall v. De Cuir*, 95 U. S. 485 [24 L. Ed. 547]." The court then quoted at length from Chief Justice Waite's opinion in that case, and said: "It is seen from this reasoning that the foundation for holding the act void was that it necessarily effected the conduct of the carrier, and regulated him in the performance of his duties outside and beyond the limits of the state enacting the law. A provision for the delivery of telegraphic messages arriving at a station within the state is not of the same nature as that statute, and would have no such effect upon the conduct of the telegraph

Hart v. State

company with regard to the performance of its duties outside the state." After referring to other cases, the court asks about the statute then under consideration: "Is it a mere police regulation that but incidentally affects commerce, such as *Smith v. Alabama*, 124 U. S. 465 [8 Sup. Ct. 564, 31 L. Ed. 508], and which, at any rate, would be valid until Congress should legislate upon the subject, or is it of such a nature, so extensive and national in character, that it could only be dealt with by Congress? We do not think it is the latter. It is not at all similar in its nature to the case above cited of *Hall v. De Cuir*." In *Illinois Central R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107, the rule was thus stated: "The state may make reasonable regulations to secure the safety of the passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic."

Many other illustrations might be given from the decisions of the Supreme Court to show the views of that court on legislation by the states which in any way burdens or interferes with interstate commerce. The court has undoubtedly enlarged the classes of cases to which the police powers of the states may be made applicable (although such a decision as *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 464, *supra*, caused four of the justices to dissent); but it has been very careful not to permit them to pass laws which in any way regulate interstate commerce. Statutes which can reasonably be said to be necessary for the protection of passengers and property while being carried through a state have generally been sustained, and some that only affect the comfort and convenience of the public have also been, but not so much latitude has been allowed in the latter cases. The cases of *Munn v. Illinois*, *Chicago, etc., R. R. Co. v. Iowa*, and *Peik v. Chicago, etc., R. R. Co.*, which held that the states, in the absence of legislation by Congress, had power to regulate interstate carriers in matters of domestic concern although interstate commerce may be thereby affected, were so modified as to practically overrule them in some respects. *Wabash, St. L. Pac. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. The Supreme Court sustained a statute requiring a limited number of trains to stop at stations of over 3,000 inhabitants (*Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702), and also one requiring all regular passenger trains to stop at county seats (*Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064); but it denied the validity of a statute requiring an interstate fast mail train to turn aside from its course so as to stop at a county seat (*Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107), and a statute requiring every passenger train to stop at county seats, regardless of the number of such trains and of the character of the traffic, was held to be unreasonable and void because imposing a direct burden upon interstate commerce (*Cleveland, etc., R. R. Co. v.*

Hart v. State

Illinois, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868). That statute was said to be subject to the criticism made of the Louisiana statute in *Hall v. De Cuir* that, "while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of business throughout his entire voyage."

Although the state has power to adopt reasonable police regulations to secure the safety and comfort of passengers on interstate trains while within its borders, it is well settled, as we have seen, that it can do nothing which will directly burden or impede the interstate traffic of the carrier, or impair the usefulness of its facilities for such traffic. When the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the states, the power is in its nature exclusive, and the state cannot act. The failure of Congress to act as to matters of national character is, as a rule, equivalent to a declaration that they shall be free from regulation or restriction by any statutory enactment, and it is well settled that interstate commerce is national in its character. Applying these general rules to the particular facts in this case, and bearing in mind the application of the expressions used in *Hall v. De Cuir* to cases involving questions more or less analogous to that before us, we are forced to the conclusion that this statute cannot be sustained to the extent of making interstate passengers amenable to its provisions. When a passenger enters a car in New York under a contract with a carrier to be carried through to the District of Columbia, if, when he reaches the Maryland line, he must leave that car, and go into another, regardless of the weather, the hour of the day or the night, or the condition of his health, it certainly would, in many instances, be a great inconvenience, and possible hardship. It might be that he was the only person of his color on the train, and no other would get on in the state of Maryland, but he, if the law is valid against him, must, as soon as he reaches the state line, leave the car he started in, and go into another, which must be furnished for him, or subject himself to a criminal prosecution. Or take, for illustration, the Cumberland Valley Railroad from Winchester, Va., to Harrisburg, Pa. In Virginia a law of this kind is in force, while in West Virginia and Pennsylvania there is none, as far as we are aware. On a train starting from Winchester the passengers must be separated according to their color for six or eight miles, when it reaches the West Virginia line, then through West Virginia they can mingle again until they reach the Potomac, when they would be again separated, and so continue until they reach Mason & Dixon's line, when they are again permitted to occupy cars without regard to their color. If the railroad company did not deem it desirable or proper to have separate compartments throughout the journey—and oftentimes it might be wholly unnecessary for the comfort of the passengers on said trains, as there might be very few colored persons on them—there would be at least three changes

Hart v. State

in that short distance. We cannot say, therefore, that, as applied to interstate passengers, such a law as this would be so free from the objections pointed out in the cases above mentioned as to be sustained under the police powers of the states.

Although we have said above that there was a distinction between this case and that of *Hall v. De Cuir*, we are of the opinion that the Supreme Court has intimated very strongly that when a case such as this comes before it for decision the same conclusion would be reached as in that case—that the law was contrary to the commerce clause of the Constitution. The language of the Chief Justice used in that case would apply with equal force to this statute, and the Supreme Court has over and over again not merely cited that case as authority, but quoted at length the language used with approval. Although many of the decisions of that tribunal have been modified, distinguished, or overruled, and very few important cases have been decided on this clause of the Constitution without dissent from one or more of the court, we find none from the language used by Chief Justice Waite. Without further discussing the subject, we are convinced from what it has already said that the Supreme Court will, when called upon to determine this precise question, decide that such a law as this is invalid, in so far as it affects interstate passengers, and, being of that opinion, we must accept that as the law by which we are to be governed.

In the case of *Smith v. Tennessee*, 100 Tenn. 494, 46 S. W. 366, 41 L. R. A. 432, the contrary conclusion was reached in an exceedingly able opinion; but as we understand the decisions of the Supreme Court on analogous questions, and the views so strongly indicated by them on this particular subject, we do not feel at liberty to follow the Tennessee court. In *Plessy's Case*, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639, the court held a similar law to be unconstitutional. In Mississippi and Kentucky the state courts so limited their decisions as to cause the Supreme Court to affirm them on the ground that they had confined the statutes to intrastate passengers.

This conclusion will require us to reverse the judgment appealed from, as the appellant was an interstate passenger. As that question was also argued, it is proper to add that we see no difficulty in sustaining the law in so far as it applies to intrastate passengers. The statute, it is true, uses broad language, but no broader than that in other states which have been construed by the Supreme Court and by state courts to apply only to passengers within the state. *Plessy v. Ferguson*, the Mississippi Case, and Kentucky Case, *supra*. It may be questionable whether our statute does not contemplate confining the law to local business, as in section 7 it exempts parlor and sleeping cars and "through express trains that do no local business." If it be necessary for the comfort and safety of the passengers, and especially for the preservation of order, in portions of the state where the two races are anything like equally divided in numbers, or the feeling be-

Central of Georgia Ry. Co. v. Augusta Brok. Co

tween the races is such as to make it desirable to keep them separated, the carriers themselves have full authority to do so, as we have seen above. They could undoubtedly adopt such regulations, even to interstate trains, as would relieve them and their passengers from all danger and inconvenience on account of the two races traveling together, by having separate cars or compartments on trains doing local business.

We are, then, of the opinion that, although the act of 1904, p. 186, c. 109, of the Laws of Maryland, is valid in so far as it affects commerce wholly within the state, it is invalid as to interstate passengers, and must be construed as not applying to them. The judgment will be reversed, and, as there can be no conviction of the appellant on the facts alleged in the indictment, a new trial will not be awarded.

Judgment reversed, without awarding a new trial.

CENTRAL OF GEORGIA RY. CO. v. AUGUSTA BROKERAGE CO.

(Supreme Court of Georgia, March 27, 1905.)

[50 S. E. Rep. 473.]

Intrastate Commerce—Carriage of Freight—Discrimination—Through Bills of Lading—Reloading Cars at Terminal Points—Affecting Only Single Carrier—Commodity Privileges—Former Trial—Instructions.*—The rule promulgated by the Railroad Commission of this state, that carriers, "in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight," prohibits discrimination against shippers, not against commodities.

(a) As to issuing through bills of lading, or furnishing its cars to connecting carriers, in order that shipments may be carried to ultimate destination without reloading at terminal points, a carrier may discriminate against cotton seed, provided all shippers of that commodity are treated alike.

(b) That such discrimination is dictated by the business interests of the carrier, and really affects but a single shipper, because he is the only person at a terminal point who is engaged in shipping cotton seed out of the state, cannot alter the matter.

(c) The carrier may at any time change its policy as to furnishing shippers of a certain commodity privileges which, under the law, it is not bound to extend to them.

(d) That a case on trial has been before the Supreme Court, and

*As to the right of carriers to discriminate in favor of certain commodities, see *Robinson v. Baltimore & O. R. Co.* (C. C. A.), 12 R. R. R. 468, 35 Am. & Eng. R. Cas., N. S., 468 (different places for receiving different kinds of freight).

As to the duty to furnish facilities without discrimination, see foot-note appended to *State v. Chicago, etc., R. Co.* (Neb.), 13 Am. & Eng. R. Cas., N. S., 336, 36 Am. & Eng. R. Cas., N. S., 336.

As to what is, and what is not, discriminative in rates forbidden by the interstate commerce act, see foot-note appended to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* (Miss.), 12 R. R. R. 471, 35 Am. & Eng. R. Cas., N. S., 471.

Central of Georgia Ry. Co. v. Augusta Brok. Co

that court has held that the plaintiff's petition sets forth a cause of action, is of no concern to the jury; nor should they be instructed as to the law upon abstract propositions wholly disconnected with the issues of fact they are called on to determine.

Carriage of Freight—Discrimination—Application of Rule of Railroad Commission.—The operation of rule 36 of the Railroad Commission of Georgia is, by its own terms, limited to intrastate shipments; and unjust discrimination against shippers engaged in interstate commerce, as to the matter of issuing through bills of lading or furnishing reshipping facilities at terminal points within this state, does not constitute a violation of that rule.

Punitive Damages—Pleading.—Where a plaintiff sues to recover punitive damages for a particular wrongful act, and relies, as evidencing the animus with which that act was committed, upon the commission of a wholly independent act, done at a different time and place, the defendant should be advised by the plaintiff's pleadings of the case he is expected to meet.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Augusta Brokerage Company against the Central of Georgia Railway Company. Judgment for plaintiff, and both parties bring error. Judgment on main bill of exceptions reversed, and on cross-bill affirmed.

Lawton & Cunningham and *J. C. C. Black*, for plaintiff in error.

Wm. H. Fleming, for defendant in error.

EVANS, J. When this case was before this court on a former occasion, it was held that the plaintiff's petition set forth a cause of action, and that the special demurrers urged against it were not well taken. 121 Ga. 48, 48 S. E. 14. A trial upon the merits was had in the court below, and resulted in a verdict for \$3,005 in favor of the plaintiff. A motion for a new trial, presented in behalf of the defendant railway company, was overruled, and it excepted. By a cross-bill of exceptions the plaintiff brings under review various rulings made during the progress of the trial which were adverse to it.

1. The gravamen of the brokerage company's complaint was that the railway company had, in violation of a rule promulgated by the Railroad Commission of this state, providing that carriers, "in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight," wrongfully refused to place a car loaded with cotton seed on a side track in the rear of its warehouse, refused to allow reshipment of its cars at Augusta, and that the company's refusal so to do was in pursuance of a predetermined plan to drive the plaintiff out of the business of buying cotton seed at points along the railway company's line of road. As evidencing that such was the purpose of the railway company, the plaintiff alleged that it had also refused to issue through bills of lading from a station in Burke county to points beyond its line, notwithstanding the common practice of the railway company was

Central of Georgia Ry. Co. v. Augusta Brok. Co

to issue such bills of lading to other patrons. The evidence, however disclosed that the railway company, while issuing through bills of lading on shipments of general merchandise, declined to do so on shipments of cotton seed, and in this respect there was no discrimination against the plaintiff. It further appeared that, although the plaintiff had asked that a through bill of lading on a shipment of cotton seed at the Burke county station should be issued to one of two points in Georgia beyond the railway company's line, the request was not made in good faith, and the plaintiff would not have accepted the bills of lading if the railway company had signified its willingness to issue them. The trial judge nevertheless instructed the jury that, should they believe the defendant company discriminated against the plaintiff as to issuing through bills of lading on intrastate shipments, this would be a violation of rule 36 of the Railroad Commission, and the plaintiff would be entitled to recover such damages as resulted, and the jury could visit upon the railway company exemplary damages if they found its refusal to issue to the plaintiff through bills of lading was willful. The court further instructed the jury as follows: "If it is the common practice of a railroad company to allow reshipping privileges or through bills of lading for all classes of merchandise generally, it cannot arbitrarily select any one class of merchandise, and refuse such privileges to dealers in that class of merchandise. In order to justify such discrimination, there would have to be differences in the circumstances and conditions of shipment." These and other instructions of similar import are excepted to on the ground that they were not authorized either by the law or the evidence, and were highly prejudicial to the railway company.

The first of these instructions certainly ought not to have been given. The plaintiff was not suing for damages resulting from the refusal of the railway company to issue a through bill of lading from the station in Burke county. The plaintiff could not, in the city court of Richmond county, recover damages for a tort committed in Burke county; and, moreover, had the plaintiff sued in the latter county, no recovery of damages because of such refusal would have been authorized, for the evidence shows that the application for a through bill of lading on an intrastate shipment was not bona fide. The plaintiff really wanted a through bill of lading to some South Carolina point. Had the railway company issued through bills of lading to other shippers of cotton seed at the Burke county station, but declined to accord like privileges to the plaintiff, this fact would, as was held when this case was here before, afford competent evidence touching the alleged purpose of the railway company to break up the plaintiff's business. However, the plaintiff failed to establish any such unjust discrimination, and therefore what occurred at that station really had no bearing on the case, unless the court was right in the view of the law expressed in the charge which we have above quoted.

Central of Georgia Ry. Co. v. Augusta Brok. Co

The rule of the Railroad Commission alleged to have been violated prohibits discrimination against shippers, not against commodities. All shippers of a given commodity must be treated alike, but the carrier is not bound to have fixed and unvarying rules applicable alike to each and all kinds of freight, or to any given class of freight when shipped in car-load lots. In the first place, it was optional with the railway company whether or not it would adopt the custom of issuing any through bills of lading or delivering its cars at Augusta to connecting carriers in order that freight might, without reloading on cars furnished by them, be reshipped in bulk. *Coles v. Central Railroad*, 86 Ga. 251, 12 S. E. 749. It could, without committing itself to any duty of so handling raw commodities, issue through bills of lading, or afford such reshipping facilities to shippers of manufactured articles or any other kind of freight it might choose to handle in that way. In the absence of any duty imposed by law, it could even arbitrarily so conduct its business in this respect as to discriminate between cotton seed and grain, lumber, or other products. Counsel for the railway company very frankly concede that it had a "policy" which governed its decision in not issuing through bills of lading on shipments of cotton seed from points along its line or allowing facilities at Augusta for the reshipment of that product in bulk over competing lines. This policy was doubtless a purely selfish one, inasmuch as the railway company looked to its own material business interests, rather than to those of the plaintiff or other brokers engaged in handling cotton seed. But the plaintiff also had a "policy." It was not a philanthropic one. The situation may thus be summarized: The oilmills at Augusta depended largely for a supply of cotton seed upon the territory through which ran the defendant railway company's line. They delivered to it their manufactured products for shipment, so the railway company got a short haul on the raw cotton seed, and also a long haul on the reshipments made over its line of the manufactured products. It was not to the business interests of the railway company that cotton seed grown at local stations on its Augusta & Savannah Branch should be shipped to oilmills located in South Carolina, for none of the manufactured products could then be secured for reshipment, at a high rate, over its road. Its interests dictated that the cotton seed should stop at Augusta, and be manufactured into oil and by-products by the mills located at that point. The railway company therefore determined that it would not, by voluntarily granting facilities to shippers which it was under no legal duty to afford, supply the means of diverting from its road profitable shipments which it otherwise would receive. On the other hand, the material business interests of the brokerage company demanded that it should be granted such facilities. It was a free lance, in open competition with the oilmills at Augusta in the buying of cotton seed at the lowest price possible, and all the seed purchased by it was shipped from Augusta over the Southern Railway to

Central of Georgia Ry. Co. v. Augusta Brok. Co

South Carolina mills. To reload shipments at Augusta for the South Carolina trip was expensive. To get through bills of lading, or to secure the consent of the defendant company that its loaded cars be delivered to the Southern Railway at Augusta, so that the seed might be carried to its ultimate destination without reloading, would render the business of the brokerage company profitable, the business of the Augusta oilmills less remunerative. Their interests and those of the defendant railway company were coincident. Its interests and those of the brokerage company conflicted. The railway company acted as the average business man would have done; that is all. In declining to grant the privileges which the brokerage company wished to enjoy, the railway company merely adopted a policy which was within its legal rights as a carrier. *State v. Railroad Co.*, 104 Ga. 437, 30 S. E. 891. That the brokerage company may have been the only broker in Augusta or elsewhere affected by this policy cannot alter the case. As a shipper, it was not discriminated against, though one of the commodities it handled was, incidentally. The railway company had the undoubted right to refuse to make through shipments of any freight, or to permit its cars to leave its line of road, however they might be loaded. To compel it to adopt a policy whereby no discrimination against a particular commodity would result would not necessarily benefit the brokerage company, but might react to its disadvantage, and be inimical to the interests of shippers of other commodities, for it would then be within the power of the carrier to decline to deliver its cars for carriage over other lines under any circumstances. It may be that for this reason our Railroad Commission has not deemed it wise to attempt to prohibit any discrimination between different commodities belonging to a general class of freight.

If, as the evidence discloses, none of the patrons of the defendant company were granted the privilege, at Augusta, of having shipments of cotton seed in its cars turned over to connecting lines for transportation in bulk without reloading, then the plaintiff is not entitled to recover damages because of the railway company's refusal to accord it this privilege, and the evidence bearing upon the "policy" of the carrier in this regard was not competent for the purpose of sustaining the plaintiff's contention that the purpose of the defendant was to drive it out of business. Animus cannot be inferred from what one does while acting strictly within his legal rights. That during the previous cotton season the carrier had granted the privilege sought by the brokerage company cannot affect the matter at all. The carrier could change its policy at any time it saw fit, and the plaintiff had timely notice of its intention to withdraw this privilege at the close of that season.

What is said above disposes of a number of assignments of error made upon the charge of the court, and also of exceptions taken to the refusal of the court to give in charge pertinent re-

Central of Georgia Ry. Co. v. Augusta Brok. Co

quests which were in accord with the law as herein announced. The only contention of the plaintiff which the evidence tended to sustain was that the defendant had wrongfully refused to place a car loaded with cotton seed on the side track in the rear of plaintiff's warehouse, and that the purpose of the railway company in refusing to do so was to put the plaintiff to unnecessary expense in reloading at a different place, and thus discourage its engaging in the buying and shipping of cotton seed. There was proof of aggravating circumstances attending this discrimination against the plaintiff and in favor of the local oilmills, and the jury were warranted in reaching the conclusion that the conduct of the railway company was willful, and in pursuance of a pre-determined plan to throw every obstacle in the way of the plaintiff to prevent shipment of seed into South Carolina. But the case was not fairly or correctly presented to the jury, and a new trial must result.

At the request of plaintiff's counsel, the court informed the jury that in a decision on one branch of this case the Supreme Court had settled the law of it in favor of the plaintiff, holding that, if the plaintiff sustained by evidence the allegations of the declaration as to the conduct of the railway company with regard to intrastate business, the plaintiff would be entitled to recover. Complaint is made of this instruction on the ground that it was prejudicial to the defendant, in that it conveyed the impression to the jury that the Supreme Court had practically decided the case against the defendant, and it had no valid defense. Suffice it to say that the charge was at least irrelevant to any issue before the jury, and could serve no legitimate purpose in their determination of the case. Two other instructions are justly complained of as being inapplicable to the facts of the case, and therefore inappropriate and misleading. One was to the effect that, while it was no proper business of a common carrier to facilitate particular enterprises or to build up new industries, yet, as the carrier depended for its very existence upon the will of the people, it was bound to deal fairly with the public, furnish reasonable transportation facilities, and to put all of its patrons upon an absolute equality. The other instruction was as follows: "A railroad company cannot discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity; at least, where both ship in car-load lots."

2. Another question presented for determination, both by the main bill and the cross-bill of exceptions, is whether or not the court correctly interpreted and presented to the jury the meaning and effect of rule 36 of the Railroad Commission, in so far as interstate shipments were concerned. The operation of that rule is, by its own terms, limited to intrastate shipments, and therefore cannot be held to apply to shipments originating in this state but destined for points beyond its borders. A bill of lading issued from a station in Georgia to one in South Carolina

Central of Georgia Ry. Co. v. Augusta Brok. Co

would evidence an interstate shipment, whether it was to be carried all the way by the initial carrier or was to be delivered by it at some intermediate point to a connecting carrier for transportation to ultimate destination. The ultimate destination of a shipment intended to take one continuous journey would determine its character in this respect. Facilities afforded for carrying through a cargo in bulk, without reloading at an intermediate point, would attach, according to the circumstances, to either interstate or to intrastate commerce. A failure to afford equal facilities to all shippers engaged in interstate commerce would not be a violation of rule 36. The instructions of the court to this effect were correct, but might properly have been more specifically applied to the facts by giving the request to charge on this subject presented by counsel for the railway company. The plaintiff appears to have been engaged altogether in making interstate shipments of cotton seed, no delivery being made to the plaintiff in Augusta except for the purpose of reloading on Southern Railway cars, in order that the seed might make one continuous journey from Georgia into South Carolina.

3. The plaintiff, in its petition, complained of a refusal by the railway company, on December 9, 1903, to deliver one car of cotton seed on a side track in the rear of the plaintiff's warehouse, and for this alleged tort both actual and punitive damages were claimed. At the trial the plaintiff offered to prove that shortly before and shortly after that date the defendant refused to deliver other car-load lots of cotton seed on that side track; the evidence being offered, counsel announced, for the purpose of proving plaintiff's contention that the defendant had a predetermined plan to drive plaintiff out of the cotton seed business, and for the further purpose of showing aggravating circumstances. Upon the objection of the railway company that the plaintiff had not alleged any of these matters of aggravation, the court excluded the evidence. The plaintiff also offered to prove by a witness that about January 12, 1904, he had seen certain bills of lading covering shipments of cotton seed from Midville, Ga., to Manning, S. C., issued by the defendant to Allan W. Jones, in whose name the shipments had been made, although the seed was the property of the brokerage company. On the ground that the bills of lading were the best evidence of what were their contents this testimony was excluded. Plaintiff then attempted to prove by the same witness that these shipments came through Augusta, and witness knew of his own knowledge that the cotton seed was not there reshipped or transferred to other cars, and had duly reached Manning, S. C. Counsel stated that the purpose of this testimony was to show that through bills of lading must have been issued, for otherwise the shipments could not, without reshipment at Augusta, have reached Manning, S. C. The defendant objected to the introduction of this testimony, and the court excluded it on the ground that it related to transactions which took place after the

Central of Georgia Ry. Co. v. Augusta Brok. Co

filing of the suit. To all of these rulings exception is taken in the cross-bill. Each of them was, we think, correct.

"The assessment of damages is usually governed by the situation or condition of affairs existing at the time the action is brought." 13 Cyc. 177. The general rule as to the recovery of special damages is, where they are not such as naturally flow from the wrongful act complained of, that "it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered," which involves making a statement of the facts upon which the plaintiff relies for a recovery thereof. Id. 176. Where "a willful wrong is committed, evidence of matters tending to aggravate the damages, when necessarily or legally arising from the act complained of, is admissible without special averment." Id. 175, 176. But it is apparent that, where a plaintiff sues for a given wrongful act, and relies, as evidencing the motive with which that act was committed, upon another wholly independent act, done at a different time and place, the defendant should be advised by the plaintiff's pleadings of the case he is expected to meet. A case bearing directly upon this proposition is that of *Leavitt v. Cutler*, 37 Wis. 46, which was a suit for damages because of a breach of a contract of marriage. The court held: "In such an action the fact that the plaintiff has been seduced by defendant by means of the alleged promise of marriage may be shown to enhance the damages, if it is alleged in the complaint, but not otherwise." See, also, *Klopfer v. Bromme*, 26 Wis. 372, 376. In the present case the defendant company could hardly have been expected to be prepared to meet charges that, after suit was commenced, it had committed certain specific acts which were wrongful, and which tended to prove that the acts complained of in the petition were willfully committed; nor was the defendant put upon notice that the plaintiff would attempt to prove, as an aggravating circumstance, that on given occasions prior to the commencement of the action the defendant had wrongfully refused to place on plaintiff's side track cars other than the one described by number in the petition. Had the plaintiff undertaken to amend its pleadings, the defendant could have claimed surprise. Certainly, the testimony offered was not admissible under the pleadings as they stood.

Judgment on main bill of exceptions reversed; on cross-bill affirmed. All the Justices concur.

TEXAS & P. RY. CO. *v.* COUTOURIE.

(Circuit Court of Appeals, Second Circuit, December 20, 1904).

[135 Fed. Rep. 465.]

Evidence—Relevancy on Issue of Negligence—Habitual Intoxication.*—Where the destruction of a large quantity of cotton by fire while it was piled in and around sheds on a dock was charged to have been due to a course of negligent conduct on the part of the agents and servants of defendant, which was in possession of the cotton as carrier, in so piling the cotton as to subject it to unnecessary danger, and as to render it difficult to discover a fire, if one should start, in time to stop it; in allowing cotton to be piled over the fire apparatus provided, so that it could not be used; and in failing to provide sufficient or competent watchmen—it was competent for plaintiff to show that defendant's superintendent in charge of the dock, whose duty it was to attend to such matters, habitually became intoxicated and neglected his duties during the time the cotton was being placed on the dock.

Witnesses—Examination—Responsiveness of Answer.—To a question whether the gangways left between piles of baled cotton were straight, "or how were they?" an answer which, after stating that they were usually straight, added that "sometimes the cotton might happen to fall off and block them a little," was responsive; the immediate question to which the examination was directed being as to whether the gangways were so left as to enable watchmen to readily discover a fire, should one start in the cotton.

Depositions—Sufficiency of Objections.—A general objection to a question asked a witness on the taking of his deposition, as immaterial and irrelevant, without stating any specific ground, was properly overruled.

Error—Review—Admission of Evidence.—Error cannot be assigned in the appellate court to the admission in evidence of letters, a portion of which was relevant, on the ground that other parts were not, where no motion was made to strike out the irrelevant parts.

Evidence—Relevancy.—Upon the issue as to the negligence of a railroad company in failing to employ a sufficient number of watchmen to guard a large quantity of cotton piled upon its wharf against fire, evidence as to the existence at the time of labor disturbances relating to men employed on ships loading at such wharf was competent.

Negligence—Instructions—Proximate Cause.—In an action to recover damages for loss of property by fire, while in defendant's possession as carrier, through the alleged negligence of defendant in failing to take proper measures for its protection, the failure of the court to specifically define in its instructions the distinction between proximate and remote causes was not reversible error, where the jury were told that, to authorize a recovery, the defendant must not only have been negligent, but its negligence must have been the "direct cause" of the loss.

Trial—Instructions—Refusal of Requests.—Instructions requested, although technically correct, are properly refused where the court, in its general charge, has covered the ground in different language.

Same.—Instructions requested in an action for negligence considered, and held properly refused, as either covered by the general charge, or as omitting pertinent facts shown by the evidence.

*As to the admissibility of evidence of habits or reputation as bearing on question of negligence or contributory negligence, see *Illinois Cent. R. Co. v. Prickett* (Ill.), 13 R. R. R. 139, 36 Am. & Eng. R. Cas., N. S., 139, where all the preceding authorities in this series are collected.

Texas & P. Ry. Co. v. Coutourie

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here by writ of error from a judgment of the United States Circuit Court for the Southern District of New York, entered upon a verdict of a jury, for the sum of \$5,047.74, in favor of the plaintiff below.

Rush Taggart, for plaintiff in error.

Treadwell Cleveland, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. This action is one of a series of cases arising out of a fire which occurred at Westwego, La., a point on the Mississippi river opposite the city of New Orleans, on November 12, 1894, and which destroyed a large amount of cotton there stored on defendant's wharf and in its cars. The defendant had undertaken to transport this cotton from points in Texas to Havre, France. By its bill of lading it was exempted from liability for destruction by fire.

Former decisions discussing the situation and covering various questions raised as to the liability of the defendant are reported as follows: *Texas & Pacific Railway Company v. Clayton*, 84 Fed. 305, 28 C. C. A. 142; *Id.*, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. Ed. 725; *Reiss v. Texas & Pacific Railway Company*, 98 Fed. 533, 39 C. C. A. 149; *Texas & P. R. Co. v. Reiss*, 99 Fed. 1006, 39 C. C. A. 680; *Id.*, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. Ed. 358; *Texas & Pacific Railway Company v. Callendar*, 98 Fed. 538, 39 C. C. A. 154; *Id.*, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. Ed. 362; *Marande v. Texas & Pacific Railway Company*, 102 Fed. 246, 42 C. C. A. 317; *Id.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; *Id.*, 124 Fed. 42, 59 C. C. A. 562.

The bill of exceptions challenges certain rulings, charges and refusals to charge, and specific portions of the charge of the court below.

For the purpose of a satisfactory understanding of the situation, it is necessary to first discuss the arrangement of the wharf and buildings at Westwego, the course of business there, and the condition of affairs at and prior to the time of the fire. The wharf extended along the bank of the river. On it were located two covered freight sheds, open at the ends and sides, each about 150 by 260 feet in size, known respectively as Nos. 1 and 2, and separated from each other by an open space, not planked, about 50 feet wide. There was one track in front of these sheds on the river side, and two tracks in the rear, situated at a distance from the sheds of 15 feet in front and 10 feet in the rear, and prior to November 12, 1894, a great quantity of cotton had been accumulating for some weeks at the wharf and in cars in the rear of the sheds. On the 12th of November both sheds and a considerable part of the intervening space were filled with bales of cotton. There was evidence tending to show that there were

Texas & P. Ry. Co. v. Coutourie

over 20,000 bales of cotton at the wharf; that the bales were piled up as high as possible in the sheds; that the platform was crowded; that cotton was stowed beyond the sheds toward the river, close to the railroad track, and was unprotected by any covering; that the sheds were blocked; and that, while there were gangways across the sheds, there were no gangways lengthwise of the sheds and parallel with the river. There was also evidence to the effect that the only appliances provided for use in case of fire consisted of a tank connected with hydrants, three in each shed having a coil of hose, and a row of barrels with buckets, and some fire buckets, and that no instructions had been given to the men in charge of the dock as to their use, and no fire drill had ever taken place, and that on the night of the fire the hydrant nearest to the place where the fire broke out was blocked with cotton. Although the defendant had been notified of a fire smouldering in some bales of cotton a short time before, and of the increased danger of fire owing to labor troubles, and of the great accumulation of cotton at this point, it had reduced the number of its watchmen in charge so that on the night in question there were but four men in charge of this whole property. The head watchman had had no instructions or experience in the use of fire apparatus, and was confessedly incompetent for the duties of his position.

Upon the trial of a former case, *Marande* against this defendant (184 U. S. 192, 22 Sup. Ct. 340, 46 L. Ed. 487), the Supreme Court reversed the decision of this court, which had affirmed the action of the court below in directing a verdict for the defendant and refusing to permit the plaintiff to go to the jury on the question of the negligence of the defendant. The grounds on which the Supreme Court rested its opinion were as follows: (1) That the manner in which the cotton was stored, in connection with the operation of the locomotives in the immediate neighborhood of the cotton, which was unprotected by any covering, afforded sufficient proof to go to the jury that it was such as to prevent prompt detection of a fire in season to prevent conflagration. The Supreme Court took the view that, in view of the evidence, a fire might have smouldered for a considerable period prior to its breaking out into flames; that the jury would have been justified in drawing the inference that the sparks from the locomotives falling upon the unprotected cotton might have caused it to ignite; and that the manner in which the cotton was stored, without having gangways extending lengthwise through it, so that the presence of fire might be promptly detected, would afford ground for the jury to find that such negligent storage prevented the seasonable discovery of the fire, because of the absence of such gangways, through which it might have been properly inspected. (2) That the evidence as to the presence of three watchmen only to care for such a vast accumulation of cotton was sufficient to go to the jury on the question whether, if an adequate force of watchmen had been on hand, the fire

Texas & P. Ry. Co. v. Coutourie

might have been detected in time to save the cotton from destruction. (3) That the evidence that cotton was piled up around the posts where the hydrants were situated, and above the coil of hose, so that neither was visible nor accessible from the gangway, and that no systematic inspection of the fire apparatus and no rules for its use had ever been promulgated, furnished reasonable grounds from which the jury would be entitled to infer negligence, creating such a condition as to conduce to error of judgment, for which the defendant should be held responsible.

The first assignments of error argued relate to the admission of evidence as to the intemperate habits of one Wilkinson, who was the superintendent in charge of defendant's wharf at Westwego. It was his business to inspect the hydrants and hose daily, and to keep the gangways clear. One of his clerks testified as follows:

"Q. Did you notice how Wilkinson attended to his duties? A. Well, he was all right in the first part of the day, but in the latter part he was not so good. Used to booze a little too much. Q. Where did he booze? A. Well, that I could not say. He used to go off. Of course, I was attending to my duties. * * * Q. How early in the day did Wilkinson begin to booze, on the average? A. Well, about 11 o'clock he was pretty well loaded. Q. You mean by that he drank heavily? A. Yes, sir. * * * Q. After 11 o'clock in the day, when you say he was pretty well loaded, did you see him about there attending to his duties? A. He would walk around sometimes, making a little fuss. That is about all."

Another clerk testified as follows:

"Q. Do you know what Mr. Wilkinson's habits were as to drinking? A. Yes; I have seen him under the influence of liquor many times during the day."

Other testimony to the same effect was admitted, to all of which defendant duly excepted.

It is unnecessary to discuss the general rule of law as stated by counsel for defendant, "that evidence of past habits or occurrences is inadmissible to prove negligence on the part of the defendant." We are not here concerned with the class of cases where injury has resulted from a single specific act of negligence of a servant on a specified occasion, and where the sole question is as to the conduct of the servant on such occasion. Here the negligence complained of in this particular consisted, *inter alia*, not in a specific act or neglect, but in a course of business; not in anything done or left undone at the moment when the fire was discovered, but in a situation, claimed to have been produced by continuous negligent acts and omissions, involving a combination of blocked alleyways, hydrants obstructed by bales of cotton, unconnected hose, lack of proper supervision, incompetent servants, etc. The evidence as to Wilkinson's previous habits and condition does not relate to the question as to whether

Texas & P. Ry. Co. v. Coutourie

he was drunk when the fire broke out, but was introduced to show that the situation complained of, which prevented the use of proper means for seasonably discovering and extinguishing the fire, was due to his negligence. We think the admissibility of this evidence may be tested by a consideration of the question as to whether, in view of the existing facts, it would have been admissible to show that no one had been employed to superintend the wharf, or that the person employed as superintendent had been absent and had neglected his duties during a period prior to the fire, or that he was insane, infirm, or otherwise manifestly incapacitated for such position, or that he had in fact negligently caused or directed the care and stowage of the cotton, or had negligently supervised its location, and the means of discovering and extinguishing fires. "The question is, did the servant exercise ordinary care in the exercise of his duties?" *Barrows on Negligence*, 100. And we think it was proper to submit to the jury the facts as to his condition during the time while such alleged improper stowage and blocking was going on, in order that they might determine whether his condition was such that he could not have properly discharged his duties. The general rule is well stated as follows:

"Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. *Thayer's Cases on Evidence*, 2, 3. 'If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.' *Insurance Company v. Weide*, 11 Wall. 438, 440, 20 L. Ed. 197. The question as to its admission or rejection addresses itself to the court as one to be answered with a view to practical rather than theoretical considerations. The guiding principle is well stated in *Stephen's Digest of the Law of Evidence*, c. 1, p. 36, in these words: 'The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other.'" *Plumb v. Curtis*, 66 Conn. 154, 166, 33 Atl. 998.

Error is next assigned to the admission of the following testimony:

John C. Trainor, a check clerk, who had been in the employ of the railroad company for about two months prior to the fire, testified by deposition as follows:

"Q. Were the gangways that you have stated ran across the shed— Were they straight, or how were they? A. They were usually straight. Sometimes the cotton might happen to fall off and block them a little."

Texas & P. Ry. Co. v. Coutourie

Counsel for the railroad company moved to strike out the last half of the answer, as not responsive to the question. It appearing that no objection was taken to the question or answer when the deposition was given, the court overruled the objection, and counsel duly excepted. Irrespective of the claim that the objection should have been made at the taking of the deposition, we think the ruling was correct. The question was as to the condition of the gangways—"how they were"—and the first part of the answer, as to their usual condition, was not complete without the further statement as to their condition when bales of cotton blocked the gangways. The motion to strike out was not based upon the remoteness, incompetency, or immateriality of the answer, but solely on the ground that it was not responsive.

The deposition of one Paul Lecorgne, another check clerk for the railroad company, was read, and the following questions and answers were admitted against objection:

"Q. Did you at any time ever notice how the cotton was piled around any of the hydrants? A. Well, it was piled all around about nine tiers high. The cotton was piled higher than the hydrants. Q. Where, in relation to the gangways, were the posts at which the hydrants were? Do you recollect? A. The hydrants were situated in the center of the shed. Those hydrants were supposed to be left in a gangway. Some were, and others were not."

No ground of objection to the first question was stated. The exception to its admission, therefore, need not be considered. The second question was objected to on the ground that it was immaterial and irrelevant. The contention now made in support of these objections is that the testimony was irrelevant because it "was not limited to the time of the fire; but the questions themselves in the last two cases, and the answer in the first, showed that it related to conditions at any time during the time of the witness' employment upon the wharf, and not to the time of the fire, or immediately anterior thereto, and therefore was prejudicial to the defendant." It appears, however, that the first witness had only been in the employ of the railroad for about two months preceding the fire. The date of employment of Trainor, and Lecorgne's statement, "I worked at this checking business all the time during October and November, 1894," would indicate that they were only testifying to the condition of affairs on the dock shortly prior to the fire—the general situation alleged to be due to the continuous negligence of the railroad company, and which it was claimed directly caused or contributed to the loss. In the absence of any statement of objection at the time of taking the deposition on the ground of remoteness, and of any motion to strike out on said ground, we think the testimony was properly admitted, or at least that the general objection taken was properly overruled. *New York Electric Equipment Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Evanston v. Gunn*, 90 U. S. 660, 25 L. Ed. 306.

Texas & P. Ry. Co. v. Contourie

Error is further assigned to the admission of correspondence between Mr. Saterlee, the secretary and treasurer of the defendant, and its general manager, and to the examination of said Saterlee in connection therewith. Said evidence was objected to as immaterial and irrelevant. The objection was overruled, and the defendant duly excepted. An examination of this correspondence shows that all of the letters related in part to the situation of the cotton at Westwego, and to its accumulation there. This portion was certainly competent to show the knowledge on the part of defendant's officers of the increasingly dangerous conditions prevailing at Westwego, in connection with the evidence of its failure to take proper steps to remedy the situation. It is true that some of the correspondence related to other matters, but, inasmuch as no motion was made to strike out the relevant portions, the exception cannot be here taken to the correspondence on the ground that it was incompetent and immaterial. *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061.

Error is next assigned to the admission of certain correspondence between the principal of a detective agency and the defendant's freight agent in regard to the outbreak of a fire on the wharf at Westwego on October 23d, prior to the present fire. This evidence contained a number of irrelevant hearsay statements, which were not proper for the consideration of the jury. Otherwise the letters were competent to show the knowledge of the defendant as to this prior fire. The admission of said correspondence was objected to, but no ground of objection was stated, and no motion was made to strike out the irrelevant testimony. The objection, therefore, need not be considered. *Noonan v. Caledonia Mining Co.*, *supra*; *Burton v. Driggs*, *supra*.

Furthermore the court charged the jury on this point as follows:

"The statements made in the Boylan report regarding the fire at Westwego on October 24th, which were read to you by Mr. Cleveland, are not to be taken as proof of the facts therein stated. The report was admitted simply as evidence of notice to the defendant respecting that fire, and you must disregard the statements therein contained in making up your verdict."

The exception must therefore be overruled.

Error is next assigned to the admission of evidence as to labor disturbances at New Orleans, on the ground that these disturbances had nothing to do with the laborers employed at Westwego. Westwego is, however, situated opposite the city of New Orleans. There was evidence to show that these labor troubles had been caused by the employment of colored men on the ships, and that these ships were constantly docked and loading at Westwego. This testimony was introduced for the purpose, as stated by counsel, of raising the question whether, in view of said labor troubles, the defendant should not have increased the number of watchmen after the first fire. Upon mo-

Texas & P. Ry. Co. v. Contourie

tion of counsel for defendant that the testimony in regard to the labor troubles be stricken from the record, the court said as follows:

"It hardly strikes me that the testimony in reference to the labor riots should be expunged from the record, following the suggestion that the gentleman has just made. To a certain extent, it has a bearing upon the precautions which your clients should have taken in the preservation of the cotton—the fact that they knew."

The admission of the evidence as thus limited was proper, and the exception is overruled.

Error is further assigned to various refusals of the court to charge as requested by the defendant.

Under the exceptions to the refusal to charge requests 4, 13, 14, and 14a, the preliminary objection is made "that there is an entire absence of any definition of direct or proximate cause," and "that the court did not in its charge in any way convey to the jury any idea as to this distinction between a proximate and a remote cause." No statement of the distinction between a proximate and a remote cause was formulated in the requests presented, and no request for such definition was embodied in the requests to charge. No definition of proximate cause was included in the requests, except such as is contained in request No. 13, which was as follows:

"(13) You are instructed that not only must the plaintiff herein prove negligence upon the part of the defendant company in caring for the protection of said cotton against fire, but said plaintiff must show by a preponderance of evidence that the negligent act was the proximate or direct cause of the loss of said cotton by fire. The mere proof of a negligent act, without showing that said act was directly connected with, and was the immediate or proximate cause of, said fire, would not be sufficient evidence of the negligence of the defendant, for which it would be liable in this case. Within the meaning of the law, the proximate or direct cause of a loss is such a cause as that without such cause the loss could not have occurred."

In this request, and in requests 1 and 5, the words "proximate" and "direct" are treated as synonymous or equivalent words, or, taken together, as in the first request, are used as a mutually qualifying and explanatory term.

In conformity to said requests, the court charged the jury as follows:

"Was the defendant negligent in regard to its care and custody of the cotton in suit? And if you shall determine that it was so negligent, was that negligence the direct, proximate cause of the loss of the cotton? * * * The question for the jury to consider here is the situation in its entirety. Was the defendant, under all the existing circumstances and surrounding circumstances, on the night of November 12, 1894, guilty of negligence which directly resulted in the destruction of the cotton? is the

Texas & P. Ry. Co. v. Contourie

question for the jury to consider. * * * In order to determine whether or not the defendant has been negligent in this case, and whether that negligence was the direct cause of the loss, you must first determine what the facts are. * * * The burden of proof to establish the liability of the defendant for the loss of the cotton in suit is at all times upon the plaintiff, and it is incumbent upon the plaintiff to prove by a preponderance of evidence the act or acts of negligence complained of against the defendant, and to show that such act or acts of negligence—some or all of them—contributed directly to the loss of the cotton. * * * Other negligent acts must be coupled therewith before the jury is entitled to find that the negligence directly contributed to the loss of the cotton. * * * The plaintiff was under no obligation to show the origin of the fire. He must, however, establish such facts as will warrant the inference that the defendant was negligent in respect to the cotton, and the further inference that because of that negligence the fire either originated or was allowed to spread, and thus to destroy plaintiff's cotton; * * * and, if from these facts you are enabled to draw the conclusion that the defendant was guilty of such negligence as directly and proximately contributed to the loss of the cotton in suit, your verdict should be for the plaintiff."

Also, in the portion of the charge quoted above, the court, after reviewing the specific allegations of negligence, said:

"Whether all or any of such facts, if they show negligence, show that kind of negligence which contributed directly and proximately to the loss of the cotton."

An examination of text-books and decisions on this question shows the difficulties in the way of framing such a definition of proximate cause as would have enlightened the jury and helped them in the decision of this case.

The Supreme Court of the United States says:

"And we have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discrimination." *Insurance Company v. Tweed*, 7 Wall. 44, 52, 19 L. Ed. 65.

"No general rule for determining when causes are proximate, and when remote, has yet been formulated." 7 *American & English Encyc. of Law* (2d. Ed.) 382; *Spaulding v. Winslow*, 74 Me. 534.

In *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664, the court says:

"Many cases illustrate, but none define, what is an immediate or what is remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case."

Texas & P. Ry. Co. v. Coutourie

Judge Cooley, in his work on Torts, devotes several pages to propositions illustrating the principle, and approves the following definition from Addison on Torts:

"If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

"Proximate" is defined as "lying or being in immediate relation with something else," and as synonymous with "direct" or "immediate." "Proximate cause: The nearest, the immediate, the direct cause; the efficient cause." Anderson's Dictionary of Law, 155. The word "direct" is defined as meaning "free from intervening agencies or conditions; hence characterized by immediateness of relation or of action." Standard Dictionary. And this is the meaning of a proximate cause, as stated by the Supreme Court in Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, where the court says:

"The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

A proximate cause is one from which the injury follows as a direct and immediate consequence. It is the dominant cause—the one that necessarily sets the other causes in operation. Cooley on Torts, 73; Insurance Company v. Boon, 95 U. S. 117, 24 L. Ed. 395.

If the court had seen fit thus to define proximate cause, and had further explained to the jury that it was not necessarily the nearest in time or place to the catastrophe, and that merely incidental causes are not proximate, or that, when "the wrong and damage are not sufficiently conjoined or concatenated as cause and effect to support an action," the cause is remote, or had stated the law still more elaborately as laid down in text-books and decisions, the objection now under consideration would have been obviated. But the object of a charge is to state the law applicable to the facts in such plain and simple language that it may be fully understood and intelligently applied by the average juror. And we think it is at least doubtful whether the jury in the case at bar would have derived any clear idea of the law from such elaborate definitions in a charge, qualified as they must be by a statement of the elements of time, conjunction of wrong and damage, intervening agencies, efficient as distinguished from instrumental causes, etc. If the court had further stated or illustrated the doctrine in its charge, it is doubtful whether such statement would have been sufficiently comprehended to be accurately applied, if sufficiently comprehensive to be accurate. We think, under the circumstances, that its failure so to do was not reversible error. The kind of negligence which contributed directly and proximately to the loss of the cotton,

Texas & P. Ry. Co. v. Coutourie

and "was the direct cause of the loss," and "directly resulted in the destruction of the cotton," would be to the mind of the average juror the immediate and efficient cause, without intervening causes, and therefore the proximate cause. If the court had charged the jury in the language of the Supreme Court in *Scheffer v. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070, the defendant would have had no ground of exception to the failure to define proximate cause. Said language is as follows:

"In order to warrant a finding that negligence or an act amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

But the court went further than this, and charged, in effect, that, in order to establish liability on the part of the defendant, it must appear that the negligence directly and proximately contributed to cause the loss.

We think, on the whole, that the language of the charge was quite as favorable to defendant as was required, under the circumstances.

But it is argued that counsel were entitled to have the jury instructed as to whether certain specific things were proximate or remote causes, as requested in requests 4, 14, and 14a. These requests cover the alleged negligence in the management of the wharf, the stowing and protection of cotton, the inadequacy of the force of watchmen, and the insufficiency of the apparatus for extinguishing fires. The charge of the court had fully covered the general propositions of law applicable to the case, and had instructed the jury to consider the situation in its entirety, and to determine the question of defendant's negligence, and whether such negligence, if found, was the direct and proximate cause of the loss. The court was not bound to charge, as requested, 4, 14, 14a, and 19, assuming those requests to be technically correct, because they singled out particular circumstances, omitting others of equal importance, when the general charge of the court had sufficiently covered the whole situation. The general rule applicable to this subject is well settled by the decisions of this court and of the United States Supreme Court:

"It is much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law, for a multitude of instructions, all stated in different language and meaning the same thing, tends rather to confuse than to enlighten the minds of the jury." *New York, Lake Erie & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71.

Rio Grande Western Railway Co. v. Leak, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160; *Grand Trunk Railway Co. v. Ives*,

Texas & P. Ry. Co. v. Coutourle

144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas & Pacific Railway Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Pennsylvania R. Co. v. Palmer*, 127 Fed. 956, 62 C. C. A. 588.

The fifth request to charge, which was refused, is as follows:

"(5) If the jury find that there was any delay in forwarding the cotton from Westwego by reason of the negligence of the defendant railway company, or by reason of the failure of the ocean carriers to send for and take away the cotton as it was received at Westwego, and that but for the defendant's negligence in failing to forward the cotton from Westwego, or the ocean carrier's failure to receive and take it away, it would not have been in the cars or under the sheds at the time the fire occurred, such negligent delay in forwarding would not make the defendant liable in this case, for the reason that such negligent delay would, in law, be the remote, and not the direct and proximate, cause of the destruction of the cotton."

We think defendant was entitled to this charge. It states the law as laid down by the Supreme Court of the United States in *Railroad Company v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; and inasmuch as the jury might, on the evidence, have found negligent delay, without instructions that such delay was not the proximate cause, they might have been misled into rendering a verdict for plaintiff on the ground of delay. The question is whether this request was practically covered by the charge of the court. The court charged the jury, *inter alia*, as follows:

"All the various questions relating to the accumulation of cotton on the Westwego wharf just prior to the fire; the sufficiency and efficiency of the care and custody of the cotton by day and by night; whether the watchmen at night, if sufficient, were competent, as firemen, to protect the cotton from fire; whether it was necessary that those in charge of the cotton should have been given reasonable instructions, at least, in the way of managing the fire apparatus; whether the various appliances for extinguishing the fire were such as should have been provided under the circumstances as they then existed; whether access to the appliances was rendered difficult by the manner in which the cotton was piled; whether the appliances themselves could be properly handled, under the circumstances of the case, by those within reach of the cotton on the night of the fire; whether any other facts upon which the plaintiff may rely to establish negligence on the part of the defendant do, in your minds, accomplish that result; and further whether all or any of such facts, if they show negligence, show that kind of negligence which contributed directly and proximately to the loss of the cotton. All these questions, as I said a minute ago, are for you to decide, and upon that decision your verdict will rest."

If this were all that the court had said upon this question, there might be ground for holding the exception well taken. But in its charge the court, after having fully explained to the jury the rule as to reasonable care, also said as follows:

Walker v. Georgia Ry. & Elec. Co

"In order to find the defendant free from negligence, the jury must find that the degree of care exercised on the night of November 12, 1894, was commensurate with the risk as it then existed. The accumulation of cotton on the Westwego wharf at the time of the fire, no matter for what reason it had accumulated, is not alone and by itself enough, even if found to be an act of negligence, upon which to base a verdict for the plaintiff. Other negligent acts must be coupled therewith before the jury is entitled to find that the negligence directly contributed to the loss of the cotton."

The exception is therefore overruled.

The sixteenth request is sufficiently covered by the charge of the court.

The eighteenth request to charge is as follows:

"(18) Defendant's servants engaged upon said wharf were only called upon to exercise and use ordinary care, and when suddenly called upon in an emergency of the discovery of a fire in the cotton they are not to be held to the exercise of the same degree of caution as in other cases, nor is the defendant to be held liable because of a failure to exercise the best judgment which the case rendered possible. If, when confronted with the sudden emergency of the discovery of the fire, the watchmen employed by the defendant used their judgment, and undertook by the aid of the appliances furnished by it to extinguish the fire, the defendant would not be liable, even if you find that the watchmen did not employ the fire extinguishing apparatus to the best advantage, or exercise the best judgment in using the same."

We think this request was properly refused because it failed to contain any reference to the fact that, if the condition which conduced to the alleged error of judgment was the direct result of the negligence of the defendant, then it would be liable therefor. *Marande v. Texas & Pacific Railway Co.*, *supra*.

The judgment is affirmed, with costs.

WALKER v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia, March 7, 1905.)

[50 S. E. Rep. 121.]

Carriers—Injury to Passenger.*—If the plaintiff proved his case as laid, he disproved it on cross-examination, and showed that, without any emergency or necessity justifying the same, he voluntarily stepped from a rapidly moving car at night; and there was no error in granting a nonsuit.

(Syllabus by the Court.)

*See foot-note appended to *Knoxville Traction Co. v. Carroll* (Tenn.), 13 R. R. R. 707, 36 Am. & Eng. R. Cas., N. S., 707; foot-note appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; foot-notes appended to *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am & Eng. R. Cas., N. S., 736; *McDonald v. City Elec. Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436.

Seaboard Air Line Ry. v. Rainey

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Marshall Walker against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Marshall Walker sued the Georgia Railway & Electric Company for personal injuries. The negligence alleged was that the company had under the car an air brake which made a sound and produced a vibration when the car was at rest similar to that made when the car was in motion; that the conductor called the station; that the plaintiff believed from the announcement that it was safe to alight, and that the car had stopped, and supposed that the noise and vibration were caused by the air brake; that he proceeded to step from the car, which was in fact in motion, and received certain physical injuries. After testifying in chief to the facts stated in the petition, the plaintiff testified that he saw the gates at Ft. McPherson. "Didn't know how fast the car was running when he stepped off, but it was running pretty fast. It hadn't slowed up very much. It was running very nearly as fast as it had been all the way along there. It was running the way it had been going, down to the fort. It slowed up a little, but not much. Not much, from the way I fell. I saw the lights over there inside the barracks." The court granted a nonsuit, and the plaintiff excepted.

J. F. Golightly, for plaintiff in error.

Rosser & Brandon, W. T. Colquitt, and B. J. Conyers, for defendant in error.

LAMAR, J. (after stating the foregoing facts). The announcement of a station is not an invitation to step from a rapidly moving car. By the exercise of ordinary care the plaintiff could have avoided the consequences of what he claims to have been negligence on the part of the defendant. With full knowledge that the car was running at practically the same speed at which it had approached the station, and had barely begun to slow up, the plaintiff stepped therefrom without being forced to do so by the act of the conductor or other emergency. Even if he proved his case as laid, he disproved it on cross-examination, and there was no error in granting a nonsuit.

Judgment affirmed. All the Justices concurring.

SEABOARD AIR LINE RY. v. RAINEY.

(Supreme Court of Georgia, March 6, 1905.)

[50 S. E. Rep. 88.]

Arrival of Train—Duty to Awaken Passenger.*—It is not the duty of a railway company to awaken a sleeping passenger, in order to

*See monograph, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904.

Seaboard Air Line Ry. v. Rainey

advise him that his destination is reached and enable him to leave the train.

Same—Failure to Announce—Liability to Sleeping Passenger.—A failure of a railway company to duly announce to passengers the arrival of its train at a regular station affords no cause of action against it to a passenger who was bound for such station and carried beyond it, when he was soundly asleep when the train arrived there and departed therefrom, although he alleges in his petition that he was "very easy to awake from sleep," and that the mere announcement of the station would have been sufficient to arouse him from sleep; the allegation as to the effect upon him of such an announcement being a mere inference or conclusion, too conjectural and speculative to be susceptible of satisfactory proof.

(Syllabus by the Court.)

Error from City Court of Brunswick.

Action by W. H. Rainey against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant brings error. Reversed.

Crovatt & Whitfield, for plaintiff in error.

Frank H. Harris, for defendant in error.

FISH, P. J. W. H. Rainey brought an action against the Seaboard Air Line Railway Company for damages. In the view that we take of the case, the material allegations of the petition are as follows: Plaintiff purchased a ticket from defendant's agent at Savannah, Ga., for passage from that point to Brunswick, Ga., over defendant's road from Savannah to Thalman, and over the Atlantic & Birmingham Railroad from Thalman to Brunswick. After leaving Savannah, the conductor of defendant's train examined plaintiff's ticket, and informed him that he must change cars at Thalman. "Being extremely tired, petitioner went to sleep on said car, expecting that the said defendant's said agent would arouse him and notify him of his arrival at Thalman, the place where he was expected to change cars to reach Brunswick. Petitioner is very easy to awake from sleep, and, had the said conductor announced the arrival of said train at Thalman, it was itself sufficient to arouse petitioner from sleep, and the conductor did not announce the arrival of said train. * * * And petitioner specifically charges that the defendant corporation's conductor in charge of said train, nor any agent of the defendant, did announce the arrival of said train at Thalman." "On the arrival of said train at Thalman, the said conductor, nor any agent or employee of the defendant, notified petitioner of its arrival, nor did they do anything to awaken petitioner. That, so failing to awake petitioner or notify him to change cars at Thalman, petitioner was carried by Thalman by the defendant on its said train, and carried to Jacksonville, Fla., where he was landed penniless, and without the means of obtaining money or accommodation from any person." Both general and special damages were alleged. The defendant demurred generally and specially to the petition. The demurrer was overruled, and the defendant excepted.

Seaboard Air Line Ry. v. Rainey

It is well settled that it is the duty of a railroad company carrying passengers, in order to afford a passenger an opportunity to leave the train at the station of his destination, to have the name of such station announced upon the arrival of the train, and then to stop the train for a sufficient length of time for him to alight with safety. *Southern Railway Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68. But there is no duty on the part of the railroad company to awaken a sleeping passenger, in order to advise him that his destination has been reached, and to enable him to get off the train there. *Nunn v. Georgia Railroad Co.*, 71 Ga. 710, 51 Am. Rep. 284. While a demurrer to a petition or declaration is held to admit the truth of all the material, well-pleaded facts alleged therein, it does not admit mere inferences therefrom. *Southern Railway Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312; 6 Enc. Pl. & Pr. 336. Applying the rule that pleadings should be construed strictly against the pleader, it is questionable whether the petition in the present case positively alleges that no agent of the defendant announced the arrival of the train at Thalman. But granting that such an allegation is substantially set out in the petition, it is still fatally defective, for the reason that it does not appear that the plaintiff was misled thereby. He was asleep when the train arrived at Thalman, and although the petition alleges that, had the conductor announced the arrival of the train at that place, such announcement would of itself have been "sufficient to arouse petitioner from sleep," this allegation is a mere inference or conclusion of the plaintiff, so speculative and uncertain as not to amount to a fact well pleaded. In the very nature of things, it was impossible for the plaintiff to know whether the announcement, if it had been made, would have awakened him. It might have had that effect, or it might not. He was in a condition to sleep soundly, as he was "extremely tired," and voluntarily went to sleep, with his mind undisturbed by any apprehension that by so doing he might be carried beyond the station where he intended to leave the train, for he expected that the conductor "would arouse and notify him of his arrival at Thalman." In order for the plaintiff to have a cause of action based on the negligence of the railroad company in failing to have an announcement made of the approach of the train to, or its arrival at, Thalman, it should appear with at least some degree of certainty that such negligence was the proximate cause of his being carried beyond that station. It does not appear from the allegations of the petition that the plaintiff, if he had been awake, would not have known, without being informed, of the arrival of the train at Thalman. Therefore the fact that he was carried beyond that station, and on to Jacksonville, Fla., may have been due to his own negligence in going to sleep. Indeed, it seems more likely that the injury of which he complains was due to his own negligence, than it does that it was due to the negli-

Walters v. Detroit United Ry. Co

gence of the defendant. He was negligent, and the defendant was negligent; and whether the negligence of the one or that of the other was the proximate cause of the injury complained of is a question the solution of which is too conjectural and speculative to admit of satisfactory demonstration by proof. In *Southern Railway Company v. Hobbs*, supra, it was held that a failure of a railway company to announce to passengers the approach of a train to a regular station would not count against the company, relatively to a passenger who was in no way misled thereby. In that case it appeared that the plaintiff, who sued the railway company for the failure of its servants to announce the station to which she had purchased a ticket, knew of the arrival of the train at her destination, and that therefore she was not misled by a failure to announce the station. The same reasoning applies in the present case. For we think that the failure of a railroad company to duly announce to the passengers upon one of its trains the arrival of such train at a particular station ought not to count against the company, relatively to a passenger who is not able to show by any satisfactory proof that he was misled thereby.

Judgment reversed. All the Justices concur.

WALTERS et al. v. DETROIT UNITED RY. CO.

(Supreme Court of Michigan, March 7, 1905.)

[102 N. W. Rep. 745.]

Carriers—Continuance of Liability—Arrival of Goods—Notification of Consignee.*—The carrier's obligation, as such, to safely keep goods intrusted to its charge, continues, on the arrival of the goods at their destination, until the lapse of a reasonable time after the carrier has notified the consignee of their arrival, although the consignee knows the probable date of shipment and the probable time of arrival.

Error to Circuit Court, Oakland County; George W. Smith, Judge.

Action by Guy A. Walters and another against the Detroit United Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Argued before CARPENTER, MCALVAY, GRANT, MONTGOMERY, and HOOKER, JJ.

*As to when the carrier's liability on account of freight terminates after its arrival at destination, see foot-notes appended to *Normile v. Northern Pac. Ry. Co.* (Wash.), 13 R. R. R. 194, 36 Am. & Eng. R. Cas., N. S., 194.

As to whether it is the duty of the carrier to give notice of the arrival of freight at its destination, see foot-notes appended to *Gulf & C. R. Co. v. Fuqua & Horton* (Miss.), 12 R. R. R. 60, 35 Am. & Eng. R. Cas., N. S., 60.

Walters v. Detroit United Ry. Co

Brennan, Donnelly & Van De Mark and *James H. Lynch*, for appellant.

Rockwell & Zimmermann (*S. W. Smith*, of counsel), for appellees.

CARPENTER, J. On the 7th of April, 1903, plaintiffs purchased at the village of Trenton, Wayne county, certain furniture for a drug store. They placed that property in the custody of defendant's agent at Trenton, with instructions to ship the same over defendant's railway—defendant is a common carrier of merchandise—to them at Pontiac, Oakland county, on Friday, April 10th. Had the goods been sent as directed, they would, according to the usual custom, known to plaintiffs, have reached Pontiac on Saturday, the 11th, or Monday, the 13th, of April. The goods were in fact shipped on the 8th and arrived in Pontiac on the 9th. They were placed in defendant's warehouse, and were there destroyed by fire Tuesday, April 14th, before notice of their arrival was given to plaintiffs. Plaintiffs brought suit and recovered judgment upon the ground that defendant's liability as common carrier continued at the time the goods were destroyed. Defendant insists that a verdict should have been directed in its favor.

There was no evidence of defendant's negligence. If, at the time the goods were destroyed by fire, defendant continued to hold them under its responsibility as a common carrier (that is, as an insurer against all injuries except acts of God), it was liable. If it did not so hold them, it was not liable. Jurists have not agreed as to the obligation of a carrier who holds goods after transit, awaiting delivery. Respecting this question, "three distinct views have been taken: First, that when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended, also, and he is responsible as warehouseman only; second, that merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business; third, that the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification." See opinion of Cooley, J., in *McMillan v. M. S. & N. I. R. Co.*, 16 Mich. 102, 93 Am. Dec. 208. In this case Justice Christiancy concurred with Justice Cooley in holding that the view last stated was correct, while Justice Martin concurred with Justice Campbell in holding that the view first stated was correct. In the subsequent case of *Buckley v. Great Western Railway Co.*, 18 Mich. 121, a majority of the court, consisting of Justices Graves, Cooley, and Christiancy, concurred in holding that the liability of a common carrier continued a reasonable time after the goods were placed in the warehouse. There was no occasion for them to decide, and they did

Walters v. Detroit United Ry. Co

not decide, whether that reasonable time commenced to run at the time the goods were placed in the warehouse, or at the time notice was given to the consignee. We are unable to find that this precise question has ever been determined by this court. It is necessary for us to determine it now. Without undertaking to repeat the arguments of Justice Cooley, which are familiar to all careful students of the Michigan Reports, it is sufficient to say that they are so clear and forceful that we have no hesitancy in declaring that the carrier's obligation continues until the lapse of a reasonable time after he has notified the consignee of the arrival of the goods. This conclusion disposes of the case, and results in an affirmance of the judgment.

In stating this conclusion, we have not overlooked defendant's contention that the rule does not apply where, as in this case, plaintiffs knew the probable date of shipment, and the probable time of arrival of the goods. To insist that this circumstance exempts the carrier from liability is to deny the existence of the rule we have just declared. To be more precise, it is to insist that the second, and not the third, of the rules heretofore stated, is the correct one. This is clearly shown by quoting from the opinion of Justice Cooley in *McMillan v. M. S. & N I. R. Co.*, supra: "The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand, ready to take it away when received." And the same learned jurist, in stating why that rule should be rejected, states a sufficient reason for denying the present contention of defendant: "To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him, without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice, than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points."

In support of its position, defendant cites several cases decided by courts who deny the rule declared to be law in this state. It is scarcely necessary to say that decisions of a court denying the rule afford no aid in construing it.

Judgment affirmed, with costs.

CRUTCHER *v.* CHOCTAW, O. & G. R. Co.

(Supreme Court of Arkansas, Feb. 25, 1905.)

[85 S. W. Rep. 770.]

Freight—Delay in Transportation—Special Damages.*—A carrier, to be liable for special damages for delay in transportation of freight, must have had notice, before or at the time the contract was made, of the special circumstances. It is not enough that it received such notice during the delay.

Same—Same—Damages.*—There being a breach of contract for transportation of freight, by delay, the shipper is at least entitled to nominal damages and costs.

Appeal from Circuit Court, Lonoke County; Geo. M. Chapline, Judge.

Action by W. F. Crutcher against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

Action for damages alleged to have resulted from delay in transportation of a car load of cotton seed hulls and meal which was delivered to defendant at Little Rock by the Arkansas Cotton Oil Company for shipment to Lonoke, a station on defendant's road. The plaintiff alleged in his complaint that he ordered the shipment of hulls and meal to use as food for his cattle at Lonoke, and that by reason of the delay the cattle were injured, and plaintiff claimed damages therefor in the sum of \$314. He further alleged that he was dependent upon the shipment for food for his cattle, and that the defendant was notified of the urgency for a prompt delivery. There was no testimony tending to show that defendant had notice at the time of the shipment of the intended use of the commodity by the plaintiff, nor of his urgent need for same; but there was proof that after the shipment, and during the period of the delay, he notified defendant's station agent at Lonoke of those facts. The court below directed a verdict for defendant, and the plaintiff saved exceptions and appealed.

Geo. Sibly, for appellant.

E. B. Pierce and *T. S. Buzbee*, for appellee.

MCCULLOCH, J. (after stating the facts). It is settled by the decisions of this court that ordinarily the measure of damages recoverable against a common carrier, resulting from delay in transportation of property, is the difference between the value at the time and place the delivery should have been made, and the value when delivery was in fact made, with interest, after deducting freight charges. But if there be special circumstances, known to both parties to the contract of shipment, surrounding the

*See foot-note appended to *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279; *Louisville & C. Packet Co. v. Bottorff* (Ky.), 13 R. R. R. 263, 36 Am. & Eng. R. Cas., N. S., 263.

Crutcher v. Choctaw, etc., R. Co

intended use of the property, which would augment the damages resulting from delay, and which both parties reasonably contemplated from a knowledge of those circumstances, the carrier will be liable therefor. *St. L., I. M. & S. Ry. Co. v. Phelps*, 46 Ark. 485; *St. L., I. M. & S. Ry. v. Mudford*, 48 Ark. 502, 3 S. W. 814; *C. & M. Ry. Co. v. Walker*, 71 Ark. 571, 76 S. W. 1058. The same rule prevails as to other corporations and individuals. *W. U. Tel. Co. v. Short*, 53 Ark. 443, 14 S. W. 649; *Murrell v. Pacific Express Co.*, 54 Ark. 34, 14 S. W. 1098; *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. —, 79 S. W. 1052; 3 *Suth. on Damages*, p. 218; *Hadley v. Baxendale*, 9 Exc. 341.

It is contended by appellant that notice given to the carrier, after the making of the contract and shipment of the property, of the special circumstances, is sufficient to charge the carrier with the increased damages. This is not correct. The notice must be given at the time or before the making of the contract. In *Hooke Smelting Co. v. Planters' Compress Co.*, *supra*, the court said: "For it is well settled that, in order to make a party to a contract liable for special damages, he must have notice of the special circumstances at or before the making of the contract. He must, at the time he receive notice of the facts showing that upon a breach he will be subjected to special damages, be free to insist on such additional compensation as he may choose to demand. But if the price for the work, or for the part in which he is most interested, has been fixed, so that he must go ahead with the contract, then notice of the circumstances will have no effect to enlarge his liability." Though all the reasoning upon which the court reached its conclusion in the case above quoted is not applicable to the contract of a carrier for transportation of property, the principle is the same, and controls the question of increased liability in this case. *V. & M. Ry. Co. v. Ragsdale*, 46 Miss. 480; *Ligon v. M. Pac. Ry. Co.*, 3 Willson, Civ. Cas. Ct. App. § 1; *Gee v. Liverpool*, 3 L. T. N. S. 322; *Globe Refining Co. v. London Oil Co.*, 190 U. S. 545, 23 Sup. Ct. 754, 47 L. Ed. 1171.

It follows that there being no testimony tending to show notice at the time of the shipment to the defendant of any special use of the property, and no depreciation in value or price being shown, the jury should have been instructed to return a verdict in favor of defendant as to actual damages. But the undisputed testimony clearly established a breach of the contract by the defendant, and the plaintiff was entitled to a judgment for nominal damages and costs of suit; and the court erred in directing a verdict for defendant, and in rendering judgment against the plaintiff for costs. *De Yampert v. Johnson*, 54 Ark. 165, 15 S. W. 363; *Ringlehaupt v. Young*, 55 Ark. 128, 17 S. W. 710.

The cause will not be remanded for a new trial on account of the failure of the court to render judgment for nominal damages; and the judgment will be reversed, and judgment entered here in favor of appellant for all costs of the action.

KANSAS CITY, FT. S. & M. R. CO. *v.* WASHINGTON et al.

(Supreme Court of Arkansas, Jan. 21, 1905.)

[85 S. W. Rep. 406.]

Carriers—Loss of Baggage—Liability of Receiving Carrier.*—

Where a carrier sells a ticket to a point on the line of a connecting carrier, and checks the passenger's baggage through to the passenger's destination, the receiving carrier is, in the absence of express contract to the contrary, liable for loss of the baggage by the connecting carrier.

Appeal from Circuit Court, Crittenden County; Felix G. Taylor, Judge.

Action by Josie Washington and another against the Kansas City, Ft. Scott & Memphis Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. H. Trimble, for appellant.

J. T. Coston, for appellees.

BATTLE, J. Josie Washington, in her own right and as next friend of her daughter, Nora Brown, brought this action against the Kansas City, Ft. Scott & Memphis Railroad Company to recover the value of a trunk and its contents. The defendant sold to Nora Brown a ticket over its railroad from Deckerville, Ark., by way of Memphis, and thence by a connecting railroad to Argenta, in this state, and checked her trunk over the same route to the same destination. She took passage on its train, and was transported as indicated by her ticket to Argenta, but her trunk was lost on the connecting railroad between Memphis and the place to which it was checked.

The question in the case is, is the receiving carrier, in the absence of an express contract, liable for the loss of baggage by a connecting carrier; the receiving carrier having sold the passenger a through ticket, and checked her baggage through to her destination? The trial court held the former liable.

Courts differ as to what is sufficient to constitute a contract by a common carrier to transport property delivered to him to its destination, when that place is beyond its route. Some courts hold that, "when a carrier receives goods directed to a place beyond his line, he, in the absence of a stipulation to the contrary, by the very act of acceptance, engages to deliver them at their destination, wherever that may be. Other courts hold that the acceptance of the goods for shipment, so directed, implies nothing more than an agreement on the part of the carrier to transport them to the end of their route, and there deliver them to a connecting carrier to complete the carriage. The first of these views is sustained by the English courts and a few of the American states, and is known as the "English doctrine." The other

*See foot-notes appended to *Missouri, K. & T. Ry. Co. of Texas v. Harrison* (Tex.), 13 R. R. R. 617, 36 Am. & Eng. R. Cas., N. S., 617.

Little Rock & H. S. W. Ry. Co. v. Records

is adopted by the decided weight of American authorities. As this court has not adopted either view, we are at liberty to adopt that which in our opinion is more reasonable.

Mr. Lawson, in his treatise on the Contracts of Common Carriers, gives the reason for the two views as follows: "In support of the first doctrine it is argued that a different rule would work a great inconvenience. A person delivering his goods to a carrier, to be sent to a certain place, will generally rely on him alone to perform the service. He cannot be supposed to know the particular portion of the transit which the first carrier controls—much less, the other owners or proprietors of the continuous line. He intends to make one contract, but not two or three or half a dozen. When he places his property in the hands of the carrier, he at once loses all control over it. If it is not delivered, how is he to discover at what particular portion of the route it was lost? He would be forced to rely on the statements of the carriers themselves, who would be little likely to aid him in his search. If he did succeed in fixing the responsibility, he might find himself obliged to assert his claim against a party hundreds of miles away, and under circumstances which might well discourage a prudent man, and induce him to bear his loss rather than incur the expense and trouble of pursuing his remedy against so distant a defendant. The first carrier, on the contrary, has facilities for tracing the loss not possessed by the public. He is in constant communication with his associates in the business. He has their receipts for the property delivered to them, and with no inconvenience at all could charge the loss to his negligent agent. In support of the second doctrine it is simply answered that the extraordinary liabilities of common carriers cannot in justice be extended beyond their own routes, where alone they have an opportunity of choosing for themselves their servants, and of guarding the property intrusted to their care." Lawson on Contracts & Carriers, §§ 238-242, and cases cited; Hutchinson on Carriers (2d Ed.) §§ 145a-149b, and cases cited.

We think the English doctrine more reasonable, and adopt it.
Judgment affirmed.

LITTLE ROCK & H. S. W. RY. CO. v. RECORDS.

(Supreme Court of Arkansas, Jan. 28, 1905.)

[85 S. W. Rep. 421.]

Baggage—Loss on Connecting Line—Through Ticket—Liability of Initial Carrier.*—In the absence of an express contract to the contrary, an initial carrier is liable to a passenger for the loss of

*See foot-notes appended to *Missouri, K. & T. Ry. Co. of Texas v. Harrison* (Tex.), 13 R. R. R. 617, 36 Am. & Eng. R. Cas., N. S., 617.

Little Rock & H. S. W. Ry. Co. v. Records

baggage where such carrier sold the passenger a through ticket, and checked his baggage through to the point of destination, although the loss occurred on the line of some connecting carrier.

Same—Limiting Liability—Mere Acceptance of Check.†—A passenger who accepts a ticket and baggage check without any knowledge of a condition on the back of the ticket limiting the carrier's liability to its own line is not bound by such condition.

Same—What Constitutes.‡—A charge that baggage is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the class to which he belongs, either with reference to his immediate necessities or to the purposes of the journey, properly submits to the jury whether shotguns carried by a passenger in his valise, to hunt with as opportunity presented, are baggage.

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by one Record against the Little Rock & Hot Springs Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit by Record to recover of appellant for the loss of a valise and its contents, alleged to be worth \$645.30. Record purchased of appellant, at Hot Springs, Ark., a through coupon ticket from Hot Springs to Durant, Ind. T., and paid full price therefor. Appellant checked his baggage through to Durant, and it was lost after appellant had delivered it to a connecting carrier. The valise contained personal apparel and two shotguns. The guns were alleged to be worth \$250. The proof tended to show that appellee was taking the guns along to hunt with. "He sometimes hunted," and expected to use his guns when an opportunity presented. A ticket, which was shown to be a copy of the ticket sold to appellee, was read in evidence by appellant, as follows: "Issued by the Little Rock & Hot Springs Western R. R. One passage of class indicated, to point on Missouri, Kansas & Texas Ry. between punch marks, when officially stamped on back hereof, and presented with coupons attached. Subject to the following contract: In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried, as follows, to wit: (1) That in selling this ticket the Little Rock & Hot Springs Western R. R. Co. acts only as agent, and is not responsible beyond its own line. * * * (8) That baggage liability is limited to wearing apparel not exceeding \$100 in value. (9) That I will not hold any of the lines named in this ticket liable for damages on ac-

†See foot-note appended to *Jacobs v. Central R. Co. of New Jersey* (Pa.), 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562; foot-notes appended to *Marx v. Louisiana Western R. Co.* (La.), 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635.

‡See foot-notes appended to *Yazoo & M. V. R. Co. v. Baldwin* (Tenn.), 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

Little Rock & H. S. W. Ry. Co. v. Records

count of any statement not in accordance with this contract made by an employee of said lines." Other conditions were indorsed on the back of the ticket, but it is unnecessary to set them out. At the bottom of the printed matter on the ticket is a blank space for the signature. There was evidence on the part of the appellant tending to show that the ticket was sold at reduced rates, and evidence on behalf of appellee tending to show that he paid full price for the ticket. The ticket was not signed by appellee, and his evidence tends to show that he did not read the conditions on it; did not know what they were.

The appellant asked, among others, the following instructions:

"If you find from the evidence that the defendant sold to plaintiff a ticket to a point beyond its own line, with printed stipulations thereon limiting its liability to what occurred on its own line, and if you also find that the defendant safely delivered plaintiff's baggage to the C. O. & G. Ry., you must find for the defendant.

"You are instructed the guns mentioned in plaintiff's complaint, and sued for in this action, are not baggage, and defendant is not liable for their loss.

"You are instructed that, if you find from the evidence that stipulations limiting the liability of defendant were plainly printed on the ticket sold to plaintiff, he would be bound by them, if he saw them, whether he signed the contract or not; and, if you find that he saw the stipulations, you must find for the defendant."

The court refused these and others presenting practically the same question in different form, and gave as the law of the case the following:

"(1) Baggage is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the purposes of the journey.

"(2) If you find from the evidence in this case that the defendant contracted to transport the plaintiff and his baggage from Hot Springs to Durant, and furnished him with a ticket limiting its liability only to its road, by a printed stipulation on the face of such ticket, then such a stipulation would not be availing unless the defendant has shown either that the plaintiff signed such agreement, or knew of such a stipulation.

"(3) The first question for the jury to determine is, what was the contract between the plaintiff and the defendant? Did the defendant agree to carry the plaintiff and his baggage all the way from Hot Springs, Arkansas, to Durant, in the Indian Territory, or did it act only as agent for the other connecting lines? If you find that the contract was to carry plaintiff and his baggage only to some other connecting carrier, and the evidence shows that the baggage of such passenger was delivered to some other connecting line mentioned in the ticket, and was not lost on the line of the road of the L. R. & H. S. W. R. Co., then your verdict should be for the defendant. But if you find that the contract

Little Rock & H. S. W. Ry. Co. v. Records

between the plaintiff and the defendant was to carry the plaintiff and his baggage all the way from Hot Springs to Durant, and that the baggage was lost, your verdict should be for the plaintiff, although the evidence should show that the baggage was lost either on the defendant's road, or on one of the connecting lines."

All exceptions were saved. The verdict was for appellee for \$500.

Dodge & Johnson, for appellant.

James E. Hogue, for appellee.

WOOD, J. (after stating the facts). 1. This court, in the recent case of *Kansas City, Ft. S. & M. R. Co., v. Washington*, 85 S. W. 406, decided that, in the absence of any express contract to the contrary, the initial carrier is liable to a passenger for the loss of baggage, where such carrier sold the passenger a through ticket, and checked his baggage through to the point of destination, although the loss occurred on the line of some connecting carrier.

2. Was the appellee in this case bound by the condition on the back of the ticket, to wit, "That in selling this ticket the Little Rock & Hot Springs Western R. R. Co. acts only as agent, and is not responsible beyond its own line"? The court instructed the jury that, if they found that the plaintiff (appellee) knew of this condition, they should find for the defendant (appellant). There was evidence to justify a finding that appellee did not know of the condition. Some courts hold that a carrier's liability cannot be limited by words on a ticket or check, or by other notice, even if brought to the knowledge of the passenger, unless he agrees to it. *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Camden, etc., R. Co. v. Burke*, 13 Wend. 611, 28 Am. Dec. 488; 4 Ell. Railroads, § 1661. But here, in view of the evidence and the verdict, we have the case of a passenger who accepted the ticket and baggage check without any knowledge of the conditions limiting the carrier's liability to its own line. In such a case it is clear that he would not be bound by such conditions, and we are not called upon to decide, and do not decide, what would be the effect if the passenger had knowledge of such conditions printed on the ticket when he accepted it. See the following: 4 Ell. Railroads, § 1593; 3 Wood, Railroads, 346; 2 Fetter, Car. Pass. § 399, 6 Cyc. p. 570.

3. As to whether or not the shotguns were baggage, was submitted to the jury upon a correct instruction. *Kansas City, P. & G. R. Co. v. State*, 65 Ark. 439, 51 S. W. 319; 4 Ell. Railroads, § 1644 et seq., 1648, and cases cited.

Finding no error in the judgment, it is affirmed.

STEIDL v. MINNEAPOLIS & ST. L. R. Co.

(Supreme Court of Minnesota, Feb. 17, 1905.)

[102 N. W. Rep. 701.]

Carriers—Selection of Route.*—Where a bill of lading issued by the initial carrier for goods to be transported over several connecting lines of railroad, and which may be forwarded over different lines to the place of destination, contains no directions or agreement on the subject, the right to designate the route of transportation rests, by implication of law, with the carrier, and becomes a part of the contract.

Same—Same.—The right is not absolute or inalienable, however, and the contract in this respect may be changed or modified by subsequent parol agreement between the shipper and the carrier.

Same—Same—Agreement—Validity—Damages.—The evidence is examined, and held to sustain the verdict of the jury to the effect that such an agreement was made between the parties in the case at bar, and that it was founded upon a sufficient consideration, and its violation by defendant entitled plaintiff to damages.

(Syllabus by the Court.)

Appeal from District Court, Carver County; Francis Cadwell, Judge.

Action by A. L. Steidl against the Minneapolis & St. Louis Railroad Company. Verdict for plaintiff. From an order denying a motion for judgment notwithstanding the verdict for a new trial, defendant appeals. Affirmed.

Albert E. Clarke, for appellant.

Steidl & Houston, for respondent.

BROWN, J. The facts in this case are as follows: Plaintiff shipped a car load of potatoes from Perham, Minn., over the Northern Pacific Railway, consigned to himself at Oskaloosa, Iowa. At the time of the shipment the agent of the Northern Pacific Railway Company issued and delivered to him the usual bill of lading, which contained no stipulations or directions as to the route over which the car should be forwarded from Minneapolis, the terminus of the Northern Pacific line. To reach Oskaloosa it was necessary that the car be transported from Minneapolis over defendant's line as far, at least, as Albert Lea, this state. From there it might be sent over defendant's line to Angus, Iowa, thence over the Chicago, Rock Island & Pacific road to Oskaloosa; or from Albert Lea over the Burlington, Cedar Rapids & Northern road to Columbus Junction, and thence to Oskaloosa; or by way of the Iowa Central from Manly Junction to the point of destination. Prior to the time the car reached Minneapolis over the Northern Pacific line, plaintiff claims that he called on the assistant general freight agent of defendant, and entered into an agreement with him to send the car over the Minneapolis & St. Louis line to Angus, Iowa, thence over the Rock

*See extensive note appended to *Louisville & N. R. Co. v. Duncan & Orr* (Ala.), 8 R. R. R. 144, 31 Am. & Eng. R. Cas., N. S., 144.

Steidl v. Minneapolis & St. L. R. Co

Island road to Oskaloosa. It is claimed by plaintiff that the purpose in having the car so shipped by way of Angus was that he might at some point on the Minneapolis & St. Louis line south of Albert Lea stop the car, and make a sale of the potatoes; and that this purpose was communicated to and understood by defendant's agent at the time he agreed to send the car over that line. It is further claimed that, disregarding the agreement, defendant forwarded the car from Albert Lea over the Burlington, Cedar Rapids & Northern road, and that in consequence plaintiff was compelled to dispose of his potatoes at a price much less than he would have received for them had they been forwarded over the St. Louis line by way of Angus, and had been disposed of at points on that line. He brought this action to recover the difference between what he in fact received and what he could have sold them for on the other line. The trial court instructed the jury that, if they found that such an agreement was made, plaintiff was entitled to recover as claimed in his complaint. A verdict was returned for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The principal question presented for consideration is whether the evidence sustains the claim of plaintiff that defendant agreed to forward the car over its line to Angus, delivering it at that point to the Chicago, Rock Island & Pacific Company. It is well settled that the owner of goods delivered to a common carrier for shipment may intercept them on their journey, and demand the delivery thereof to him at any reasonable point on the carrier's line short of the original destination, upon payment of the transportation charges, and surrendering, or offering to surrender, the bill of lading for cancellation. *Hutchinson on Carriers*, §§ 337, 338; *Ryan v. Ry. Co.*, 90 Minn. 12, 95 N. W. 758. The rule applies to all connecting carriers into whose possession the goods may come in the course of transportation. *Sutherland v. Ry. Co.*, 78 Ky. 250. This right plaintiff possessed in the case at bar, and if the car had been sent over defendant's line to Angus he could have intercepted it at any station, claimed his potatoes, and sold them; and if a valid agreement was made by the parties to so forward them, it was violated by defendant, and plaintiff is entitled to recover the damages sustained by him in consequence of the violation. 6 Cyc. 383. So the case narrows down to the question whether the evidence is sufficient to sustain the verdict of the jury to the effect that a valid agreement was entered into.

The bill of lading issued by the Northern Pacific Company was by its terms made the contract between plaintiff and all connecting carriers into whose possession the car might come in the course of transportation. But it contained no directions or stipulations as to the route over which it should be forwarded from Minneapolis, and by implication arising from the relations between the parties and the silence of the contract on the sub-

Steidl v. Minneapolis & St. L. R. Co

ject the right to forward the car over any usual and customary route rested with defendant upon delivery to it for transportation. *Snow v. Ry. Co.*, 109 Ind. 422, 9 N. E. 702. But the right was not an absolute or inalienable one. It could be waived or surrendered by an agreement subsequently entered into. 4 Am. & Eng. Ency. Law (2d Ed.) 545; *Atwell v. Miller* (Md.) 69 Am. Dec. 206. The case in this respect comes within the general rule that written contracts not falling within the statute of frauds may be changed or modified by subsequent parol agreement founded upon a sufficient consideration. 9 Cyc. 763. The trial court submitted to the jury the question whether an agreement as claimed was entered into by the parties, and they found in plaintiff's favor to the effect that the agreement was made. A discussion of the evidence upon the question would serve no useful purpose, and we refrain. It is conflicting, and it is sufficient to say that we have examined it carefully, and reach the conclusion that it supports the verdict.

The contention of defendant's counsel that, conceding the agreement to have been made, it is void for want of consideration, and in that it varied the terms of the bill of lading, is not sound. The bill of lading, by its terms, provided, in effect, that it should constitute the contract, not only between plaintiff and the Northern Pacific Company, but also between plaintiff and all connecting carriers over whose lines the car might be forwarded in reaching its destination. The agreement relied upon by plaintiff was made subsequent to the original contract with the Northern Pacific Company before the car had been delivered to defendant, and at a time when plaintiff could have surrendered the bill of lading to the latter company and demanded a delivery of the property. The case does not come within the rule that contracts cannot be varied by parol. It was a subsequent transaction, and, if founded upon a sufficient consideration, was valid and binding between the parties, and operated to ingraft upon the original contract the terms of the parol agreement. The right of defendant to designate the route of transportation was merely incidental to forwarding the car, and no particular consideration other than the freight charges to be received for its services was necessary. It was within the authority of the agent to bind the company by the agreement.

We have considered all the assignments of error urged in the brief of appellant, and find no reason for reversing the order appealed from, and it is affirmed.

CONROY *v.* DETROIT UNITED RY.

(Supreme Court of Michigan, Feb. 27, 1905.)

[102 N. W. Rep. 641.]

Carriers—Injuries to Passengers—Street Railroads—Sudden Jerks—Evidence.*—Where plaintiff, a passenger on an open street car, arose as the car was approaching his destination, and stood with one foot on the platform and the other on the car step, with his hand on the rail, and, as the car stopped with a sudden jerk, he was thrown to the ground and injured, he was not entitled to recover, in the absence of evidence as to the cause of the jerk.

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by Joseph Conroy against the Detroit United Railway. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Plaintiff, a resident of Detroit, was returning to his home one evening about 10 o'clock on a car of the defendant. He had informed the conductor where he desired to alight. The car was an open one, with seats running across, and steps on each side. When near the middle of the block, the signal, by ringing the bell, was given by the conductor for a stop at the next cross-street, where plaintiff was to alight. Immediately upon ringing the bell, the plaintiff arose, went to the edge of the car, put one foot on the step, the other on the platform, and his hand on the rail. While in that position there was a sudden jerk of the car, which plaintiff claims threw him from the car, in consequence of which he received an injury. The court directed a verdict for the defendant.

Argued before MCALVAY, GRANT, BLAIR, OSTRANDER, and MONTGOMERY, JJ.

Lehmann & Riggs, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

GRANT, J. The circuit judge, in directing a verdict, held that the case was ruled by *Etson v. Railway Company*, 110 Mich. 494, 98 N. W. 298, as no one pretended to know what was the cause of the jerk which caused the plaintiff's fall. The ruling was correct. See, also, *Bradley v. Railway Company*, 94 Mich. 35, 53 N. W. 915. The cause of the jerk in this case is as problematical as it was in either of those above cited. It is common knowledge that, in order to serve the public, street cars must be started

*As to the liability of the carrier for injuries to passengers from jerks and jolts of trains or cars, see foot-notes appended to *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; *Rutledge v. New Orleans, etc.*, R. Co. (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488; *Yazoo & M. V. R. Co. v. Humphrey* (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Norfolk & A. Terminal Co. v. Morris* (Va.), 9 R. R. R. 165, 32 Am. & Eng. R. Cas., N. S., 165.

Meeks v. Atlantic & B. R. Co

and stopped with some celerity, the tendency of which is to throw one when standing. It was entirely unnecessary for the plaintiff to leave his seat, and stand with one foot upon the running board, when the car was running at full speed. He had ample time to arise and alight after the car stopped. Whether this action on his part was negligence, we find it unnecessary to determine.

Judgment affirmed.

MEEKS v. ATLANTIC & B. R. Co.

(Supreme Court of Georgia, March 4, 1905.)

[50 S. E. Rep. 99.]

Injury to Passenger—Alighting from Car—Promise of Conductor—Boarding Moving Car—Nonsuit.*—Under the facts disclosed by the record, the trial judge did not err in granting a nonsuit.
(Syllabus by the Court.)

Error from City Court of Douglas; W. H. Griffin, Judge.

Action by Elisha Meeks against the Atlantic & Birmingham Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Dart & Roan, Lankford & Dickerson, and Toomer & Reynolds, for plaintiff in error.

J. L. Swcat and Quincey & McDonald, for defendant in error.

SIMMONS, C. J. Meeks was a passenger on a mixed train of the defendant railroad company, having purchased a ticket from Waycross to Douglas. It appears that he had left some bundles at Nicholls, an intermediate station between Waycross and Douglas, and he inquired of the conductor if the train would stop long enough at Nicholls for him to get out, secure his packages, and get back on the train before it started, to which the conductor replied in the affirmative. The train stopped before it reached the depot at Nicholls. Meeks alighted, went to the depot, and got some of his bundles, which he carried into the car—the train having come up in the meantime to the depot—and was in the act of carrying another package, a sack of potatoes, into the car, when he was stopped by the conductor, who told him to “hold on,” that he had “some baggage to put off, and would notify him when to get aboard.” He waited for the notice from the conductor (how long he does not say), but he finally saw the conductor raise his hand on the train, and order the engineer forward, and the train started, whereupon he ran to the rear end of the train, and attempted to board there. Two train hands did

*As to whether it is contributory negligence to board a moving train or street car, see foot-notes appended to *Foster v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; foot-notes appended to *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 13 R. R. R. 295, 36 Am. & Eng. R. Cas., N. S., 295.

Meeks v. Atlantic & B. R. Co

the same thing, and were on the steps when Meeks took hold of the hand railing and got upon the first step with one foot. At this time the engine gave a jerk, which misplaced his foot, and left him in a swinging position, his hands still clinging to the railing, and caused his leg to strike against the depot platform, injuring him. He managed to climb into the car, unassisted, and went on to the end of his journey, but was badly injured. Under this state of facts Judge Griffin, of the city court of Valdosta, presiding for the judge of the city court of Douglas, awarded a nonsuit. We think, under this evidence, the trial judge was right. It clearly appears that Meeks could have avoided the injury to himself by the exercise of ordinary care. He saw the danger of mounting a car in motion which was attached to a mixed train—i. e., part freight and part passenger—yet he attempted to mount the steps while there were two other persons occupying them, which necessarily gave him only slight footing thereon. He says he has ridden frequently on trains before this injury, and he therefore must have known that it is dangerous to mount a moving train, especially one of a mixed character like this one. But he claims that the conductor put him off his guard by stating he would notify him when to get aboard. This conversation, according to the record, occurred while Meeks was attempting to put a sack of potatoes on the car, and the conductor told him to “hold on” until he could get some baggage off; but how long after this the train started is not stated by Meeks. It may have been five or ten minutes or more. He was on the depot platform, and could have seen when the baggage was taken from the car and placed on the platform, and he may have had several minutes in which to board the train before it started. However this may be, in our opinion he had no right to take the risk of mounting the moving car upon the steps of which two persons were already standing, although the conductor had failed to comply with his promise. If he had relied upon the promise of the conductor, then, according to the case of *Watson v. Railroad Co.*, 81 Ga. 478, 7 S. E. 854, he should have remained upon the depot platform, and brought suit upon the breach of the promise, if he could have done so. The only difference between the *Watson Case* and this one, in regard to the facts, is that in the case the conductor agreed to stop at a certain crossing, and did not do so, and the passenger jumped and was injured while in this case the conductor promised to notify Meeks when he would start, but failed to do so, and Meeks jumped upon the steps of the car. While Meeks says in his evidence that the jerk which threw his legs off the steps was violent, it does not appear that it was unnecessary in the running of this mixed train, nor does it appear that the engineer knew that Meeks was trying to mount the steps of the car at that time. For these reasons, we affirm the grant of nonsuit.

Judgment affirmed. All the Justices concur.

CHICAGO I. & L. RY. CO. *v.* REYMAN.

(Supreme Court of Indiana, Feb. 23, 1905.)

[73 N. E. Rep. 587.]

Action for Injury to Freight—Failure to File Bill of Lading.—In an action by a shipper against a carrier for damage to goods, an omission to file the bill of lading or a copy thereof is ground for demurrer.

Same—Same—Pleading.—Where, in an action against a carrier, neither the bill of lading nor a copy thereof was filed, and after demurrer on that ground leave was given plaintiff to attach a copy of the bill, the granting of such leave, which was not taken advantage of, did not amount to an amendment.

Appeal—Presumption.—Where there is an insufficient paragraph of a complaint in the record on appeal, to which a demurrer has been overruled, the presumption is, in the absence of evidence, that the error perpetuated itself in the finding and judgment, although the evidence may also have warranted a finding and judgment on a good paragraph of the complaint.

Carriage of Fruit—Ice Furnished by Shipper.—Where the shippers of fruit undertook to supply the refrigerator car with ice, the carrier had a right to assume, except as facts may have existed that put it on notice to the contrary, that the shippers had furnished enough ice to keep the car cool until a delivery to the consignee could be had in the ordinary course of business.

Same—Termination of Liability.*—Where it was the usage of the fruit trade to receive delivery and unload refrigerator cars while they were standing in some convenient place for unloading, the location of a car at that point, and a readiness to permit the consignee to take possession, relieved the carrier of further obligation than that of a warehouseman, without any notification to the consignee of the arrival of the fruit.

Same—Ice Furnished by Shipper—Delay—Duty of Carrier.—Where fruit is carried by a railroad in a refrigerator car, ice being furnished by the shipper at the commencement of the journey, there is an implication that the carrier will exercise care, if actual delivery should be delayed beyond the usual time, not to permit the fruit to be spoiled by heat.

Appeal from Circuit Court, Orange County; T. B. Buskirk, Judge.

Action by Joseph E. Reyman against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court under section 1337u, Burns' Ann. St. 1901. Reversed.

E. C. Field and *H. R. Kurrie*, for appellant.

Mitchell & Mitchell, for appellee.

GILLET, J. Complaint in two paragraphs by appellee against appellant. The first paragraph was founded on two bills of lading, and the second charged negligence as a carrier. Appellant unsuccessfully demurred to each paragraph of the complaint, and, after reserving an exception, filed answer. There was a

*See foot-notes appended to *Gulf & C. R. Co. v. Fuqua & Horton* (Miss.), 12 R. R. R. 60, 35 Am. & Eng. R. Cas., N. S., 60; foot-notes appended to *Normile v. Northern Pac. Ry. Co.* (Wash.), 13 R. R. R. 194, 36 Am. & Eng. R. Cas., N. S., 194.

Chicago I. & L. Ry. Co. v. Reyman

finding and a judgment for appellee. By proper assignments of error appellant has brought into review the sufficiency of each of said paragraphs as against the demurrer.

The first paragraph alleged that the bills of lading were lost or destroyed, and that for that reason the plaintiff could not set out the originals. Following this averment we find the following language: "Copies thereof are filed as exhibits, marked 'A' and 'B.'" No exhibit was filed or attached at any time, although the record shows that after the overruling of the demurrer and the saving of the exception appellee obtained leave to attach such exhibits. In a subsequent order book entry it is stated that by agreement of parties copies of the bills of lading are to be used on the trial, and it appears that what purport to be such copies were introduced in evidence. The first paragraph of complaint does not state any matter of excuse for failing to file copies of the bills of lading. It is deficient for the reason that neither the originals nor copies were filed with the pleading. While the paragraph might be sufficient, notwithstanding such omission, if it were drawn in question for the first time in this court, yet it is settled that the omission to file the original or a copy of an instrument, which is the foundation of the suit, with the complaint, is a ground for demurrer. *Williamson v. Foreman*, 23 Ind. 540, 85 Am. Dec. 475; *Petty v. Board*, 70 Ind. 290; *Landon v. White*, 101 Ind. 249; *Blackwell v. Pendergast*, 132 Ind. 550, 32 N. E. 319; *Miller v. Bottenberg*, 144 Ind. 312, 41 N. E. 804. Granting leave to attach exhibits, which was not taken advantage of, does not amount to an amendment. Where there is an insufficient paragraph of complaint in the record, to which a demurrer has been overruled, the presumption must be, in the absence of anything to show the contrary, that the error perpetuated itself in the finding and judgment; and this vitiates the result, although the evidence may also have warranted a finding and judgment on a good paragraph of complaint. See *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546; *Elliott*, App. Pro. § 638.

The sufficiency of the second paragraph of complaint is extremely doubtful, but as the objections urged against it are purely technical, and doubtless will be obviated by amendment, we shall not pass on this paragraph.

The evidence shows that on August 30, 1901, appellee and another shipper were furnished by appellant with a refrigerator car belonging to Swift & Co., of Chicago, for use, on its homeward trip, in shipping a considerable quantity of peaches and apples, consigned to a commission firm in Chicago, to sell for the consignors. Appellant had no refrigerator car service between Salem and Chicago, and had no facilities for supplying such cars with ice. As the car furnished had been used on its outward trip for the distribution of fresh meat, it was cool, or partially cool, when said shippers received it, and there was some ice in the tanks of the car at that time. The shippers put in enough ice to make altogether between 600 and 700 pounds. The car

Chicago I. & L. Ry. Co. v. Reyman

was to leave that night (Friday), and would be due in Chicago at 3:40 Sunday morning. The shippers made no inquiry as to the schedule or as to the probable time of delivery. It was their supposition that the car would reach its destination some time Sunday, and they put in enough ice, as they testified, to keep the car cool until it reached Chicago. The car is shown to have arrived at appellant's yards, which are situate in the neighborhood of Forty-Eighth and Forty-Ninth streets in said city, at 4 a. m. Sunday morning. At this point the cars of said train were left by the regular crew, it being the custom for a switching crew in the employ of appellant to distribute from this point the cars of incoming trains. From the time that the car reached the yards until about 8:30 a. m. Monday, there is a hiatus in the evidence. At the time last mentioned it appears that the car was standing on a teaming track, and the consignee's driver was on hand to unload the fruit. He opened the car, and found that the ice had melted, and that the fruit was seriously injured from heat. It does not appear what the usage of the commission trade was with reference to unloading fruit on Sunday, and, as indicated, there is nothing to show when the car reached the teaming track.

We cannot determine the ultimate rights of the parties, but it appears pertinent to state certain general propositions, presented by a motion for a new trial, for the guidance of the court and the parties upon another trial. The shippers having undertaken to supply the car with ice, appellant had a right to assume, except as facts may have existed that put it on notice to the contrary, that the shippers had furnished enough ice to keep the car cool until a delivery to the consignee could, in the ordinary course of business, be had. It was not the duty of appellant to notify the consignee of the arrival of the fruit in order to terminate its obligation as common carrier. If it was the usage of the trade to receive delivery and unload cars while they were standing in some safe and convenient place for unloading, the location of the car at that point and a readiness upon the part of the company to permit the consignee to take possession would relieve the company of further obligation as a common carrier. *Bansemmer v. Toledo, etc., R. Co.*, 25 Ind. 434, 87 Am. Dec. 367; *Cincinnati, etc., R. Co. v. McCool*, 26 Ind. 140; *Pittsburgh, etc., R. Co. v. Nash*, 43 Ind. 423; *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238. After that the company would still be bound, in the capacity of a warehouseman, to exercise care for the safe-keeping of the freight (*Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350; *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. Rep. 426; *Gregg v. Illinois Cent. R. Co.*, *supra*), but its stringent obligation as a common carrier would no longer continue. Construing appellant's bill of lading contra proferentem, as it is our duty to do, we think that it was not relieved of all responsibility for injury to the fruit from heat in

Bachant v. Boston & M. R. R

case of a delayed delivery. The nature of the service, and the other attending circumstances, gave rise to an implication that appellant would exercise care, if actual delivery should be delayed beyond the usual time, not to permit the fruit to be spoiled by the heat. Note to Marks v. New Orleans Cold Storage Co., 90 Am. St. Rep. 300. As to what degree of care should have been exercised depends upon whether the delay, if any, occurred while appellant was a common carrier or while it was under the obligation of a warehouseman. There are further questions in the case, but in view of the state of the record we do not feel warranted in undertaking to pass on them.

Judgment reversed, with a direction to sustain the demurrer to the first paragraph of the complaint, and to grant leave to both parties to reframe the issues.

BACHANT v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Worcester, March 1, 1905.)

[73 N. E. Rep. 642.]

Carriage of Freight—Termination of Liability.*—Where a carrier has no freighthouse at a station, and consignees are expected to unload from the car, a consignment of grain cannot be considered as delivered and the transportation ended until the consignee has been notified and the car placed where it can be conveniently unloaded.

Same—Safe Place to Unload.—A person receiving from a carrier a consignment of grain has a right to rely on the statement of the carrier's station agent that the place where the grain is to be unloaded is safe.

Same—Injury to Consignee's Team—Liability.†—A carrier, after placing a car load of grain on a spur track to be unloaded, and directing the consignee that it is ready for delivery, is liable for injuries to the consignee's team and wagon standing by the car in being run over by a locomotive on a side track.

Same—Same—Same—Admissions.—In an action against a carrier for injuries to a consignee's team while unloading freight, statements by defendant's station agent, made after the accident, cannot be received as admissions of liability, as they were not made in the performance of his duty.

Same—Evidence.—In an action against a carrier for injuries to a consignee's team while unloading freight, evidence is admissible to show that defendant's customary way of delivering freight was to place cars on a spur track, and that, while unloading, consignees would have to drive between the spur track and a side track, thus showing the method adopted by plaintiff at the time of the accident was in accordance with defendant's course of business.

Same.—Where it is not shown what answer a witness was expected to make, sustaining the objection to a question cannot be said to have been prejudicial.

*See foot-notes appended to Normile v. Northern Pac. Ry. Co. (Wash.), 13 R. R. R. 194, 36 Am. & Eng. R. Cas., N. S., 194; foot-notes appended to Gulf & C. R. Co. v. Fuqua & Horton (Miss.), 12 R. R. R. 60, 35 Am. & Eng. R. Cas., N. S., 60.

†See foot-notes appended to Sullivan v. Minneapolis, etc., Ry. Co. (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725.

Bachant v. Boston & M. R. R

Carrier—Agents.—A carrier is bound by the acts of its station agent in giving instructions to consignees as to the place for unloading freight.

Exceptions from Superior Court, Worcester County; Lloyd E. White, Judge.

Action by one Bachant against the Boston & Maine Railroad. Defendant had judgment, and plaintiff brings exceptions. Exceptions sustained.

Walter R. Dame and Amos T. Saunders, for plaintiff.

Chas. M. Thayer and Alex H. Bullock, for defendant.

BRALEY, J. This is an action of tort to recover for injuries to the plaintiff's harnesses, horses, and wagon, alleged to have been caused by the defendant's negligence while unloading grain from a car at its station in the town of Weston.

The defendant had not provided a freighthouse for the storage of merchandise, and apparently consignees were expected, on receiving notice that consignments were ready for delivery, to unload their goods directly from the cars. In accordance with this system of dealing, the transportation of the grain could not be considered as ended, or the carrier released by delivery, until the consignees had been notified and the car placed where it could be conveniently unloaded by them. *Thomas v. Boston & Providence R. R.*, 10 Metc. 472, 477, 43 Am. Dec. 444; *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, 272, 61 Am. Dec. 423; *Kimball v. Western Railroad*, 6 Gray, 542, 543; *Rice v. Boston & Worcester R. R.*, 98 Mass. 212; *Rice v. Hart*, 118 Mass. 201, 208, 19 Am. Rep. 432; *Independence Mills Co. v. Burlington, Cedar Rapids & Northern Railroad*, 72 Iowa, 535, 34 N. W. 320, 2 Am. St. Rep. 258. By the location and arrangement of the defendant's tracks, to do this the car had been run onto a spur track so located that it could be reached and unloaded only from one side. To reach the car, it was necessary to back a team into a triangular space between this spur track and a side track, which connected at each end with the main track, and was used to enable trains meeting at the station to pass each other. This space was shown by the testimony to be from 10 to 13 feet wide at the end near the highway, and gradually narrowing until it reached a point where the spur track joined the side track. The plaintiff, who was under a contract with the consignees to unload the grain, sent his servant Cote, with a team and the freight bill, to the station. Upon delivery of the freight bill to the station agent, who for this purpose represented the defendant, Cote testified that this conversation took place: "He showed me a car, and told me to back up there. It was all right." In connection with the duty imposed on the defendant, Cote was justified in relying upon this statement as an assurance that the place where the grain was to be unloaded was safe. Two loads were taken out the first day without accident, but on the morning of the second day, when, for the purpose of getting the

Bachant v. Boston & M. R. R

third load, the wagon and horses were placed between the tracks with the wagon close to the side of the car and opposite the door, they were struck and damaged by one of the locomotives of the defendant that was passing over the side track. On this evidence the jury could have found that they were properly there with the knowledge and direction of the defendant's agent, and that, in backing up to the car in the manner described, as safe a position was taken as any that could have been occupied at the time of the accident. It could have been further found that in placing the car so that it could have been unloaded they would be liable to be struck by passing trains, and that a proper place for the delivery of the grain had not been provided. Under its contract as a common carrier, the defendant was required to provide a safe and proper place for delivery. *Jewell v. Grand Trunk Railway*, 55 N. H. 84, 91. *Independence Mills Co. v. Burlington, etc., R. R.*, ubi supra; *Anchor Mills Co. v. Burlington R. R.*, 102 Iowa, 262, 71 N. W. 255.

The plaintiff, or his servant, while unloading, was not obliged to be in a state of continual apprehension that locomotives or cars might run over the side track and come into collision with the team, nor was he required constantly to observe the track to avoid such a collision. But he had the right to assume that while thus engaged, at a place designated by the defendant, he would not be subjected to injury in person or property by its negligence. *Pratt v. N. Y., N. H. & H. R. R.*, 187 Mass. 5, 72 N. E. 328. Neither the consignees nor those lawfully acting for them were obliged thus to take the chance of injury, and they were entitled, while at work in the place prescribed by the defendant, to be free from the danger of being run down by trains in its control. *Sweeny v. Old Colony & Newport R. R.*, 10 Allen, 368, 372, 87 Am. Dec. 644; *Hathaway v. N. Y., N. H. & H. R. R.*, 182 Mass. 286, 65 N. E. 387, and cases cited. After having placed the car, then, to run its locomotive so that it came into collision with the team was evidence of negligence in the management of its business at the station. Both acts showed a breach of duty towards the plaintiff on the part of the defendant. *Hathaway v. N. Y., N. H. & H. R. R.*, ubi supra.

At the trial the jury were instructed that, if the plaintiff's servant had obtained permission from the station agent to unload the grain, he thereafter assumed any risk incident to the situation, and the plaintiff could not recover. But the case before us is not parallel with *Miner v. Conn. River R. R. Co.*, 153 Mass. 398, 26 N. E. 994, where the doctrine of *volenti non fit injuria* was applied. There was evidence in that case not only showing knowledge on the part of the person in charge of the plaintiff's horse of the danger of going into the freightyard, but that, fully appreciating the danger, he voluntarily entered the yard, and that upon request he could have had the car moved to another and suitable place before being unloaded. Here the grain, if delivered at all, must be taken out where the car was placed by

Bachant v. Boston & M. R. R

the defendant; and it also appears that, if Cote's evidence was believed, he did not know there was danger from collision with trains passing over the side track. When this erroneous view of the law was stated in the first part of the instructions, no exception appears to have been taken. But in a later portion of the charge, to which the plaintiff did except, the same doctrine was repeated in these words: "Cote says he came up there in the ordinary way and asked for the shipping bill, and the number of the car was given him and the shipping bill was given him, and that was all there was to it. If that is all there was to it, then your verdict should be for the defendant." The jury must have understood from this instruction that it was not the duty of the defendant to provide a safe place for delivery of goods, and that the plaintiff's servant, after he knew where the car was, took his chance of unloading the grain at such time, and in such way as would suit the convenience of the defendant in the running of its trains, and constant observation would be required by him to avoid injury. This instruction was wrong, and, as an exception was properly saved, it must be sustained.

The remaining exceptions relate to the exclusion of evidence. Whatever was said by the agent, after the accident, relating to the use of the spur track as a delivery track, was a statement not made by him in the performance of his duty, and could not bind the defendant as an admission of liability. *Boston & Maine R. R. v. Ordway*, 140 Mass. 510, 512, 5 N. E. 627; *Wellington v. Boston & Maine R. R.*, 158 Mass. 185, 33 N. E. 393. Also the question put to the civil engineer, and excluded, does not appear to have prejudiced the plaintiff, for it is not shown what answer the witness was expected to make. *Lee v. Tarplin*, 183 Mass. 52, 54, 66 N. E. 431. But the exclusion of evidence that the space between the spur and side tracks was the place which other consignees of freight, or their servants, were told by the station agent to go into, or use, for the purpose of unloading goods from the cars, was wrong. Such instructions given by the agent were within the scope of his employment, and binding on the defendant. *Lane v. Boston & Albany R. R.*, 112 Mass. 455. And it was competent for the plaintiff to show that the defendant's customary way, in delivering freight generally, was to run cars onto the spur track to be unloaded, and that, while unloading, consignees would have to drive in between the spur track and the side track. It consequently would follow that the method adopted by the plaintiff at the time of the accident was in accordance with the direction of the agent and the general course of business with others, and hence should have been anticipated by the defendant. While the transfer was being made, it was therefore bound to see that neither the plaintiff nor his property was injured by any act of negligence on its part. *Maguire v. Fitchburg R. R.*, 146 Mass. 379, 382, 15 N. E. 904.

Exceptions sustained.

WALTER et al., v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas, March 11, 1905.)

[79 Pac. Rep. 1089.]

Carriage of Live Stock—Contract with Agent of Two Companies—Liability of Defendant—Testimony of Agent—Demurrer to Evidence.

—A contract for the carriage of live stock was made by shippers with an agent in the employ of two railway companies. The contract was composed of a letter and telegrams, in which there was no disclosure for which company the agent was acting. In an action against one of the railway companies for negligently transporting the stock, the shippers, who were plaintiffs, used the testimony of the agent in support of their action. He testified that when the contract was made he was not acting for the defendant railway, but for another company. There was no contradictory evidence on the question. Held, that a demurrer to plaintiffs' evidence was rightly sustained.

Sufficiency of Petition—Alleging Failure to Read Contract.—In an action against a carrier for injury resulting to live stock transported by it, the petition was divided into two counts, called by the pleader causes of action. The second set out a formal contract of carriage in writing, with averments tending to show that the contract was not signed voluntarily by the shippers, and that they did not read it, conveying the impression that plaintiffs were seeking to avoid its obligations. Held, that such averments did not constitute a cause of action against the carrier.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Judge.

Action by Sidney Walter and others against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The original petition in the court below was divided into two counts, called by plaintiffs causes of action. The first, stated briefly and in substance, is: That plaintiffs wrote to one Nova Douthitt, general live stock agent of the Missouri Pacific Railway Company, requesting him to quote rates on a shipment of live stock from Deane Spur, Ark., to Irving, Kan. In response, they received the following letter: "The Missouri Pacific Railway Company, St. Louis Iron Mountain & Southern Railway Company, & Leased, Operated & Independent Lines. N. Douthitt, Live Stock Agent. G. P. Robinson, E. H. Calef, J. A. Sterling, Asst. Live Stock Agents. Office of Live Stock Agent, Kansas City Stock Yards, Mo. Nov. 20-97. Rates on Live Stock. Messrs. Walter & Chaffee, Marysville, Kansas—Gentlemen: As per your request of Nov. 9th to Mr. H. G. Krake, beg to quote you on stock cattle to Irving, Kansas, from Pine Bluff, \$70.25, from Deane Spur, Arkansas, \$72.75, per standard 30 ft. car, rate on horses Irving, Kansas, to Pine Bluff, \$83.00, to Deane Spur, \$98.00 per standard 30 ft. car, no through rate to Marysville, that being on a foreign line. Regarding transportation, you understand passage is granted in charge of stock, would be glad to have you call on us when you pass through Kansas

Walter v. Missouri Pac. Ry. Co

City. Very respectfully, N. Douthitt, W. L. S. A. (J. J. W.)." It is then alleged, pursuant to said letter and a verbal agreement thereafter made to pay the tariff rate, that the plaintiffs went to Monticello, Ark., a station near Deane Spur, and telegraphed to Douthitt as follows: "Monticello, Ark., Nov. 28, 1897. N. Douthitt, Stock Agent, Union Stock Yards, K. C.: Fifteen loads stock Monticello and Deane Spur. Want cars at once. Make special. Yours, Walter & Chaffee." On the next day plaintiffs received the following telegram: "Walter & Chaffee, Monticello, Ark.: Will do everything we can to furnish cars for you. N. Douthitt." It is alleged that the railway company furnished plaintiffs eight cars to be used in the transportation of stock from Deane Spur to Irving, and that they loaded therein 365 head of cattle; that through the negligence of the railway company many of them were injured, and others died.

The material part of the second count reads: "For a second cause of action the plaintiffs state that they adopt all and singular the allegations of negligence contained in the petition hereinbefore set forth, and allege and aver that after the said train containing said stock had arrived at Dumont, Ark., a distance of several miles, that there was presented to the plaintiffs a contract for the carriage of said cattle, the cattle at the time being upon the train, and having been already received by the defendant and started for their destination at Irving, Kan. That plaintiffs had no alternative but to sign said contract upon being told by the agent of the defendant that it should be so signed, the train stopping but a few minutes at Dumont, and the plaintiffs not having sufficient time to examine the contract. That the original of said contract is not in the possession of the plaintiffs, but is in the possession of the defendant; and that a copy of said contract, as furnished by the defendant, is hereto attached, and filed herewith and made a part hereof, and marked 'Exhibit A.'" Exhibit A, attached as a part of this second count, is a copy of a shipping contract entered into between plaintiffs below and the Missouri Pacific Railway Company for the carriage of the eight cars of stock from Monticello, Ark., to Irving, Kan. The petition concluded with a prayer for the recovery of \$1,275 damages by reason of the negligence of the railway company in transporting the cattle.

On motion of defendant below, the plaintiffs were required to elect on which cause of action set out in the petition they would rely for a recovery. They elected to stand on the first cause of action, and filed an amended petition omitting all reference to the written contract of shipment as contained in Exhibit A to the original petition. The railway company answered, denying under oath the authority of Douthitt to act as agent for it respecting the matters alleged in the amended petition, and setting up, with other defenses, that plaintiffs below entered into a written contract of shipment with the St. Louis, Iron Mountain & Southern Railway Company, executed at Monticello, Ark., for

Walter v. Missouri Pac. Ry. Co

transportation of the stock to Irving, Kan., in all respects the same as Exhibit A attached to the original petition, except that the carrier was designated as the St. Louis, Iron Mountain & Southern Railway Company. To this answer plaintiffs below replied, first, by a general denial, and, further, denying the execution of the written contract of shipment with the St. Louis, Iron Mountain & Southern Railway Company. On the trial the evidence tended to show that the loss and injury to the stock occurred on the line of the St. Louis, Iron Mountain & Southern Railway Company, principally at Little Rock. The court below sustained a demurrer to the evidence. Plaintiffs below complain here.

W. W. Redmond, for plaintiffs in error.

Waggener, Doster & Orr, E. A. Berry, and *W. J. Gregg*, for defendant in error.

WM. R. SMITH, J. (after stating the facts). The court did not err in requiring plaintiffs below to elect on which of the two counts or causes of action they would rely for a recovery. There was no averment in the second count that the formal contract of carriage made at Monticello, Ark., with the Missouri Pacific Railway Company, was mutually binding on the parties to it. Plaintiffs alleged that they signed the contract, but that they did so without reading it, and that no alternative was given them except to sign it after the cattle had started to their destination, and that the agent told them it was necessary to be signed by them. The brief reference to this contract indicates that plaintiffs were seeking to avoid the binding force of its provisions on them, with no intention of relying on it as an obligation for the violation of which by the railway company they sought a recovery of damages. The ruling requiring an election as to which count of the petition the plaintiffs would stand after the election was made to proceed under the first cause of action had the legal effect of striking from the petition the second count. We are unable to see how this count, if it had been allowed to stand, could have aided the plaintiffs.

There is nothing in the letter, telegrams, and verbal agreement between plaintiffs below and Douthitt, which are set out in the first cause of action and relied on as a contract with the railway company for the carriage of the cattle, showing that Douthitt was the agent of the Missouri Pacific Railway Company. Plaintiffs below, however, made this clear by the testimony of Douthitt himself, which they introduced in their own behalf. He testified: "Q. If the rate had been quoted by you, or the information furnished by your office, as mentioned in Exhibit A, for what company would you then be acting, assuming that the shipment originated on the line of the St. Louis, Iron Mountain & Southern Railway? A. In any business originating on the Iron Mountain I would be acting for the Iron Mountain. Q. You would be so acting at that time? A. Yes, sir." Exhibit

Illinois Cent. R. Co. v. Seitz

A, referred to in the question, was the letter of Douthitt, dated November 20, 1897, set out in the statement. It was thus shown by the testimony of the person with whom they contracted that he was not the agent of the railway company against which the action was prosecuted, but of another carrier on whose line of road the business originated, namely, the St. Louis, Iron Mountain & Southern Railway Company. By bringing forth this testimony, plaintiffs below removed all doubt respecting the identity of the company for which Douthitt was acting at the time the contract was made.

The judgment of the court below will be affirmed. All the Justices concurring.

ILLINOIS CENT. R. CO. v. SEITZ.

(Supreme Court of Illinois, Feb. 21, 1905.)

[73 N. E. Rep. 585.]

Requested Propositions.—Where, in an action at law tried to the court, the facts were in dispute, a submitted proposition as the law of the case, which was a mixed proposition of law and fact, was properly refused.

Carriage of Freight—False Representations as to Goods—Non-delivery—Justification—Additional Charges.—Where a consignor falsely represents to a carrier that the goods which he desires to ship are of a certain kind, and the carrier, without knowledge that they are of a different kind, accepts them and fixes the freight on the basis that they are of the character stated, the carrier, on discovering that they are subject to a higher rate, may charge such higher rate, and hold the goods until the additional charges are paid.

Same—Same—Effect of Classification by Carrier's Clerk.—Where a carrier's clerk, who classified goods to be shipped, had seen them as they were being loaded into a car, the carrier could not reclassify the goods, and demand additional freight as a condition precedent to a delivery at their destination.

Discrimination in Freight Charges—Statute—Right to Hold Goods—Additional Charges.—Where a carrier makes a discrimination in favor of a shipper by contracting to carry his goods at a lower rate than they should bear, in violation of Hurd's Rev. St. 1903, c. 114, §§ 125, 126, and carries them at that rate, it cannot, after the goods have reached their destination, charge an additional amount of freight, sufficient to bring the total charge up to the proper rate, and refuse to deliver them until the additional freight is paid.

Refusal to Deliver Freight—Justification.—Where a carrier placed its refusal to deliver goods at their destination to the owner on the ground that the additional freight imposed was not paid, it could not justify such refusal on the ground that the bill of lading, designating a third person as consignor and consignee, had not been assigned to the owner.

Appeal from Appellate Court, Third District.

Action by A. C. Seitz against the Illinois Central Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Illinois Cent. R. Co. v. Seitz

This was a suit in trover brought in the circuit court of Christian county by Seitz, the appellee, against the Illinois Central Railroad Company, appellant, to recover the value of a car load of goods, consisting of groceries, store fixtures, household goods, a horse, wagon, and harness, which had been delivered to appellant at Chicago for carriage to Pana, Ill., and which, the declaration alleges, appellant converted to its own use. Appellant filed a plea of not guilty. Three trials have been had in the circuit court. The first two were by jury, and in each instance judgment was rendered for appellee, and, upon appeal by appellant to the Appellate Court for the Third District, the judgment was reversed, and the cause remanded to the circuit court for a new trial. *Illinois Central Railroad Co. v. Seitz*, 105 Ill. App. 89; *Same v. Same*, 111 Ill. App. 242. After the Appellate Court had remanded the cause the second time, it was tried before the court without a jury, and a judgment was rendered in favor of appellee for \$823.50. An appeal was again prosecuted by the railroad company to the Appellate Court for the Third District, and that court affirmed the judgment of the circuit court. Appellant obtained a certificate of importance, and brings the cause to this court by appeal.

About 10 days before the goods were shipped, Seitz called at the freight office of appellant in Chicago, and inquired the cost of a car in which to ship goods to Pana. He informed the person of whom he made the inquiry that the goods consisted of a stock of groceries and fixtures and a horse and wagon. He was told that the amount could not be fixed without a list of the articles and their weight, but that it would be from \$25 to \$35. A man named Kendall assisted Seitz in moving the goods from Chicago to Pana. On July 20, 1901, Kendall went to the freight office of the appellant, and asked for the car that Seitz had spoken about. He was told that the car would be placed at his disposal, and he was directed to the house where the goods would have to be weighed before being loaded into the car. The car was then placed on one of appellant's team tracks. The goods were in a store in Chicago. Seitz waited at the store, and assisted in loading the goods on the dray, while Kendall remained at the freightyards and attended to loading the car. Each load was weighed by one of appellant's employees before being placed in the car. Seitz came with the last load, and, after it had been transferred from the dray to the car, he gave Kendall \$40, and told him to go and pay the freight. Kendall went to the house where the goods had been weighed. The bill of lading was there made out. Kendall directed that his name be placed in the bill of lading both as consignor and consignee. The clerk, in making out the receipt for the goods in the car, described them as "emigrant movables." He testified that Kendall told him the goods were an "emigrant outfit," and that he did not know the character of the goods that had been placed in the car. Kendall testified that he knew nothing whatever about the different

Illinois Cent. R. Co. v. Seitz

classes of freight, as classified by the railroad company, and, further, that the clerk who made out the receipt had been in the car a number of times while it was being loaded, and had seen the goods as they were transferred from the dray to the car. After the bill of lading was made out, Kendall and this clerk went to the freight office, where another clerk rated the goods as of the seventh class, based on their description as emigrant movables, contained in the bill of lading, and fixed the freight at \$28. Kendall then accompanied the clerk to the cashier's office, where he paid the \$28, and received the bill of lading, properly receipted, from the cashier. He then returned to the car, and shortly thereafter the car was attached to a freight train and taken to Pana. Seitz and Kendall accompanied the shipment. After the bill of lading had been delivered to Kendall, a freight inspector employed by the Western Railroad Weighing Association, who had seen the goods loaded into the car, saw the duplicate bill of lading which had been retained by the railroad company, and observed that the goods had been shipped as emigrant movables and placed in the seventh class, when, according to the classification adopted by the railroad company, under the rules of the Railroad and Warehouse Commission, they should have been designated as groceries, fixtures, horse, wagon, etc., and placed in the first class. The inspector, acting for appellant, thereupon changed the duplicate bill of lading to correspond with the proper classification. This change increased the freight on the goods \$45.18. Upon arriving at Pana, Seitz and Kendall went to the appellant's freight office, presented the bill of lading, and asked for the goods. They were informed that the goods could not be delivered to them unless they paid the additional sum of \$45.18. This they refused to do. Both Seitz and Kendall at that time told the agent at Pana that the goods belonged to Seitz. Two days afterward Kendall served a written notice on that agent, demanding the delivery of the goods to him. Thereafter several conferences were had between the agent at Pana and Seitz about the goods, but the agent refused to turn them over to Seitz unless the additional freight was paid. On July 17, 1901, the appellant notified Kendall and Seitz, in writing, that, unless the additional charge was paid within 24 hours, the goods would be sold to pay the same. They were thereafter sold, but subsequent to the commencement of this suit.

James M. Taylor (John G. Drennan, of counsel), for appellant.
John E. Hogan, for appellee.

PER CURIAM. Appellant submitted to the circuit court fifteen propositions to be held as the law of the case. All were refused except the tenth. The only assignment of error open to consideration here is that which challenges the action of the court in refusing the propositions other than the tenth.

The first proposition submitted is in the following words: "Under the facts as shown by the evidence in this case, the de-

Illinois Cent. R. Co. v. Seitz

fendant had the right to reclassify the goods upon the inspection thereof, and charge the proper freight, and demand the same upon the arrival of the goods at Pana, and to hold the goods so shipped until the proper freight charges were paid." The facts in this case were disputed. In order to hold the proposition above set out, it was necessary not only that the court should adopt the appellant's view of the law, but also agree with its contention in reference to the facts. The proposition is therefore a mixed proposition of law and fact, and was properly refused for that reason. Several other of the refused propositions were in like manner objectionable.

The third and fifth, however, which are substantially the same, are propositions of law. The fifth is in the language following: "If the evidence shows that the plaintiff, in the name of Kendall, secured a car from the defendant to ship goods from Chicago to Pana, and the plaintiff and Kendall loaded the car in person, and if the plaintiff or Kendall caused the goods to be billed as 'emigrant movables,' and shipped as seventh-class freight, but in fact loaded the car with merchandise, which, under the rules and classifications and tariffs of the defendant, should have been billed and charged for as merchandise, then the plaintiff becomes liable for the extra freight so charged, and the judgment should be for the defendant." The law is that if the consignor falsely represents to the common carrier that the goods which he desires to ship are of a certain kind, and the carrier, without notice or knowledge that they are of a different kind, accepts the goods, and fixes and accepts the freight and delivers to the consignor a bill of lading on the basis that the goods are of the character stated by the consignor when in fact the goods are of an entirely different character, upon which the carrier would be lawfully entitled to charge a higher rate of freight, the carrier may, upon discovering this fact before the goods are delivered to the consignee at the place of destination, charge the excess of the freight against the goods, and hold the shipment until the additional charges are paid. *Smith v. Findley*, 34 Kan. 316, 8 Pac. 871; *Missouri, Kansas & Texas Railroad Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290. The evidence tended to show that appellant's clerk, who first classified the goods as "emigrant movables," had seen the goods as they were being loaded. If he had, then the company had notice of the character of the shipment. The proposition last above set out does not include and is not based upon the hypothesis that at the time the goods were classified the appellant had no notice of their real character, or that it relied upon the description of the goods given by Kendall. For this reason the proposition was, as we think, inaccurate.

Appellant contends, however, that, even if it knew the character of the goods, it could not lawfully have allowed them to be shipped at a lower rate than the usual rate, so that it became its duty, even after collecting the freight and accepting the goods,

Illinois Cent. R. Co. v. Seitz

to reclassify them and charge the additional freight against them, for the reason that not to do so would have been an unlawful discrimination in favor of the consignor, under sections 125 and 126 of chapter 114, of Hurd's Revised Statutes of 1903. Conceding, for the sake of the argument, that making a rate lower than the ordinary rate would be an unlawful discrimination as to the party favored, within the purview of the statute referred to, we still think appellant's position untenable. If a common carrier makes an unlawful discrimination in favor of a shipper by contracting to carry his goods at a lower rate than they should bear, and accepts the goods and carries them at that rate, it cannot, after the goods have reached their destination, charge against them an additional amount of freight sufficient to bring the total charge up to the proper rate. To do so would permit the carrier to make a rate lower than it properly should make, to secure the business, and thereafter take advantage of its own wrong to increase the charge and secure the usual compensation.

The only other question of law requiring consideration was submitted, in varying language, in several propositions, and is clearly stated in the eighth, which is as follows: "The plaintiff, Seitz, being neither the consignor nor the consignee, and the bill of lading not having been assigned to him by Kendall, cannot maintain this action." It appears from the evidence of Kendall, the consignor, and Seitz, the appellee and owner of the goods, that they went together to the agent of appellant at Pana, presented the bill of lading, and sought to have the goods delivered to Seitz; that the agent was then advised by Kendall that the goods were the property of Seitz; and it further appears from their testimony that the only reason the goods were not so delivered at that time was because the additional freight charge was not paid. The agent did in fact permit Seitz to take the horse upon the latter agreeing to return it upon the agent's demand. If appellant placed its refusal solely on the ground that the additional freight was not paid, it would not now be permitted to better its hold, and contend that Seitz was not entitled to the goods because the bill of lading was not assigned. It would be estopped so to do. *Ohio & Mississippi Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. Did the testimony of Seitz and Kendall, to which we have just referred, not appear in the record, the proposition under consideration would be the law of the case. With that evidence before the court, the proposition ignored an element in the case—an alleged fact which the evidence tended to establish—and was therefore properly refused.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

KROEGER v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington, March 22, 1905.)

[79 Pac. Rep. 1115.]

Who Are Passengers—Person Boarding Car inside Car Barn.*—In an action against a street railroad for injuries to plaintiff boarding a car inside defendant's street car barn, evidence held to show that defendant was not a carrier of passengers in the barn, so as to render it liable for negligence in the construction of the barn.

Contributory Negligence—Boarding Car inside Car Barn.—Plaintiff was injured in attempting to enter an electric car through the front entrance, which was a dangerous place to enter, after the signal to start had been given, and before it had emerged from a barn used for the housing and repairs of its cars, and while the car was not to exceed three or four feet from the barn door, so that he would inevitably be caught in passing through the door, unless he got inside the car before it reached the barn door, which he failed to do; all of which dangers were open, and which he had a better opportunity to observe than any other person. Held, that he was guilty of contributory negligence as matter of law, which was the direct and proximate cause of his injuries.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by John Kroeger against the Seattle Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Morris & Southard and *Benson & Hall*, for respondent.

PER CURIAM. For some time prior to the 18th day of April, 1902, the defendant was engaged in operating a street railway system in the city of Seattle and vicinity. In connection with its railway system the defendant maintained a car barn at the corner of Fifth avenue and Pine streets, which was used for the purpose of housing, cleaning, and repairing its cars during the night, when not in service. The middle or new barn, where the accident which gave rise to this controversy happened, is 60 feet wide and 180 feet deep, facing on Fifth avenue. There were five tracks running from Fifth avenue into this barn, and extending substantially its entire length. For a distance of about 8 feet from the sidewalk on Fifth avenue the floor of the barn was on a level with the sidewalk. From this point about 8 feet back of the street line to a point 122 feet back from the street line the cement floor of the barn was constructed about 4 feet below the threshold of the barn and the street level. Trestles were con-

*As to who are, and are not, passengers, see foot-notes appended to *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683; *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *McNeill v. Durham & C. R. Co.* (N. Car.), 13 R. R. R. 647, 36 Am. & Eng. R. Cas., N. S., 647; *Foster v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; *Hudson v. Lynn & B. R. Co.* (Mass.), 13 R. R. R. 622, 36 Am. & Eng. R. Cas., N. S., 622.

Kroeger v. Seattle Electric Co

structed across this space, which supported the tracks, thus leaving open pits below so that the running gear and dynamos of the cars might be inspected and repaired from beneath the cars. Between the tracks, extending through the barn, plank walks were laid to enable the barn men to pass between the tracks from car to car with sand and other supplies, and to facilitate the work of inspection and repair. In the rear of the barn, and back of the pits above described, the floor again rose to the level of the tracks, and here were maintained derricks and other heavy machinery used in lifting the cars when trucks or dynamos were in need of repair. From 15 to 25 cars were usually housed in this barn each night. These cars were shifted about from time to time during the night, and in the early morning hours for the purpose of repairs, and also for the purpose of placing in the front of the barn the cars first due to leave in the morning. There was a "No Admittance" sign on one of the trusses above the tracks in the barn, and the employees were instructed not to receive or discharge passengers in the barn. This rule was not strictly enforced, as will hereafter appear. At the front of the barn were cast-iron columns on each side of the several tracks to support the brick work in the front part of the building. Doors, attached to each of these columns and to the side walls of the building, opened and closed over the tracks. These doors were nearly always open, except in case of emergency. The iron columns to which the doors were hung were less than 11 feet apart, and did not leave sufficient space for a person to pass in safety between a car and the door. The first regular car to leave this barn in the morning was the car from Green Lake, which left the barn at 5:15 a. m. For some considerable time prior to the 18th day of April, 1902, a number of persons were in the habit of going to this barn for the purpose of taking this first car to Green Lake and other points distant from the city. From the testimony it would seem that from four to six persons, on an average, took the first Green Lake car every morning. A majority of these were police officers, who went off duty at 4 o'clock in the morning, and took this first car to reach their homes. The few civilians who took the car were usually persons employed on the city streets or elsewhere during the night, and took the car for the same purpose. These people would reach the car barn some time before the car was due to leave, and would enter the barn and take their seats in the car, there to rest, read the paper, or sleep, as they saw fit. So far as the testimony discloses, no person other than employees was invited into the barn, and none of the above-mentioned persons was forbidden to enter it. The employees of the company were about the barn in the discharge of their duties, cleaning, inspecting, and repairing the cars, and would sometimes, upon inquiry, direct persons entering the barn which car to take to reach a given destination. Nearly all the persons who were witnesses at the trial testified that they entered the barn and took the car there for their own convenience, rather

Kroeger v. Seattle Electric Co

than wait for the car to come from the barn. The plaintiff in this action was employed on the city streets during the night of the 17th day of April, 1902, and for some time prior to that date. He quit work at 5 o'clock on the morning of the 18th, and went to this car barn to take the first Green Lake car to his home at Fremont, as he had done perhaps a dozen times before. When he reached the car barn on the morning in question, the Green Lake car was standing on the track, almost ready to start, the front of the car being about even with the front of the barn, leaving the entrance at the front of the car not to exceed from two to four feet distant from the barn door. When all was in readiness, the motorman and conductor gave the usual signals to start, the car moved forward, the plaintiff attempted to enter through the front door or entrance of the car, and was caught and crushed between the car and the barn door. While there is some slight conflict in the testimony on minor points, and some testimony of a negative character inconsistent with the above statement, the foregoing facts are so clearly established by the testimony as to leave no question of fact for a jury to pass upon. The plaintiff brought this action to recover damages for the injuries thus received, and from a judgment in his favor this appeal is taken.

Two grounds of negligence are alleged in the complaint: First, negligence in the construction and maintenance of the car barn; and, second, negligence in the operation of the car by which the respondent was injured. The answer is, in effect, a general denial and a plea of contributory negligence.

The car barn in question was constructed and maintained for the sole purpose of housing, inspecting, cleaning, and repairing the cars of the appellant company, and the plan of construction in no manner affected or concerned passengers or prospective passengers so long as the barn was used for the private purposes for which it was built. We cannot think that the limited use made of this barn by the few persons mentioned at the times and under the circumstances stated had the effect to transform this place from a car barn and workshop into a passenger station or depot. There was nothing about the place to mislead one, or to induce one to believe that the barn was a proper place for passengers to enter cars for rest or for sleep. When a majority of those persons entered the barn to take the car, the car was standing on trestles over a pit, without a crew, and it would be going entirely too far to hold that the appellant was a common carrier of passengers in relation to a car so situate. All persons who entered this barn to take cars did so between the hours of 5 and 6 o'clock in the morning. They adopted this practice for their own comfort and convenience. All their surroundings indicated to them clearly and fully the purpose for which the barn was constructed and used, and the dangers incident to taking the cars at that place. Considering all these facts, and more especially the class of persons who thus entered the barn in violation of the rules of the company, even conceding such rules to have been

Daly B. & T. Co. v. Great Falls St. Ry. Co

unknown to them, we have no hesitancy in saying that the appellant was not a common carrier of passengers in this barn, and was not responsible for injuries resulting to passengers from faulty construction of the barn. Were the employees in charge of the car negligent in its operation, and was the respondent guilty of contributory negligence? Ordinarily, these are questions of fact for a jury, but when honest minds cease to differ upon the facts of a given case or as to the conclusions to be drawn therefrom, the verdict of a jury must give way. It cannot avail the respondent to say that he did not hear the customary warning that the car was about to start. The warning was unquestionably given, and he was either engaged in conversation, as claimed, and as testified to by one of his own witnesses, or for other cause, for which he alone is responsible, did not hear it. The respondent attempted to enter the car in a dangerous, unusual place, after the usual signals for the forward movement of the car had been given. He attempted to make the entry through a door or entrance which was not to exceed three or four feet from the barn door. He would necessarily and inevitably be caught and crushed unless he succeeded in making the entrance before the car reached the door. All these dangers were open and apparent to him. He had a better opportunity to observe and avoid the dangers than any other person. He was either negligent in not discovering or observing the danger, or he was reckless in his attempt to avoid it, and there seems no room to doubt as a matter of law that he was guilty of contributory negligence, and that such negligence was the direct and proximate cause of his unfortunate accident. The court should have so instructed the jury. We think it did so charge, in effect, but the instruction should have been peremptory.

For this error the judgment is reversed, with directions to dismiss the action.

DALY BANK & TRUST CO. OF BUTTE v. GREAT FALLS ST. RY. Co. et al.

(Supreme Court of Montana, April 4, 1905.)

[80 Pac. Rep. 252.]

Statutes—Construction—Railroads—Lien of Judgment—Street Railroads.*—Comp. St. 1887, div. 5, § 707, declaring that a judgment against any railway corporation for any injury to person or property shall be a lien superior to that of any mortgage or trust deed, being a part of an act (Act March 3, 1887) relating exclusively to steam railroads has no application to street railroads.

Appeal from District Court, Cascade County; Jno. W. Tatton, Judge.

*See foot-notes appended to *San Francisco, etc., El. Ry. Co. v. Scott* (Cal.), 11 R. R. R. 819, 34 Am. & Eng. R. Cas., N. S., 819; foot-note appended to *city of Philadelphia v. Philadelphia Traction Co.* (Pa.), 8 R. R. R. 951, 31 Am. & Eng. R. Cas., N. S., 951.

Daly B. & T. Co. v. Great Falls St. Ry. Co

Action by the Daly Bank & Trust Company of Butte against the Great Falls Street Railway Company and another. From a judgment for plaintiff, defendant Lizzie Hamilton appeals. Affirmed.

Toole & Bach, for appellant.

W. T. Pigott, for respondent.

HOLLOWAY, J. In 1891 the Great Falls Street Railway Company, a New Jersey corporation, owning and operating a street railway system in Great Falls, Mont., executed a blanket mortgage or deed of trust to secure an issue of bonds in the aggregate amount of \$500,000, to which the Massachusetts Loan & Trust Company was a party as trustee. Bonds to the amount of \$150,000 were issued as of even date with the mortgage, and within two years thereafter other of such bonds in the further sum of \$75,000 were issued, negotiated, and passed into the hands of third parties. Afterwards the plaintiff, Daly Bank & Trust Company, was substituted as trustee in the place and stead of the Massachusetts Loan & Trust Company. On February 15, 1896, the defendant Lizzie Hamilton recovered a judgment against the Great Falls Street Railway Company for personal injuries received by her, and on February 12, 1903, that judgment was renewed. This action was commenced in September, 1903, to foreclose the mortgage or trust deed, and defendant Hamilton was made a party, it being alleged in the complaint that "the said defendant Lizzie Hamilton has, or asserts or pretends that she has, some interest in or lien upon the said real property of said railway company, which is inferior to the lien of the said first mortgage or deed of trust." The street railway company defaulted, and defendant Hamilton filed an answer wherein she pleaded the judgment recovered by her against the street railway company, and its renewal, and alleged that the lien of such judgment is prior and superior to the mortgage given by the railway company. The plaintiff thereupon filed a motion for judgment on the pleadings, and this motion was granted, and a decree of foreclosure entered adjudging plaintiff's mortgage to be a lien prior to the judgment lien of the defendant Hamilton, and directing a sale of the mortgaged property in accordance with the provisions of the mortgage or trust deed. From this decree the defendant Hamilton appealed.

Only one question is presented for our determination, namely: Does section 707, div. 5, Comp. St. 1887, apply to street railway companies, so as to render the judgment recovered by defendant Hamilton in 1896 and renewed in 1903 a lien upon the railway company's property prior and superior to the mortgage given upon such property by the railway company in 1891? If it does not, the decree should be affirmed; if it does, the decree should be modified, so as to provide for the satisfaction of such prior claim. Section 707, above, reads as follows: "A judgment against any railway corporation for any injury to person or prop-

Daly B. & T. Co. v. Great Falls St. Ry. Co

erty, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act." If considered alone, this section might be deemed sufficiently broad in its terms to include street railway companies as well as the ordinary railways of commerce. But where doubt arises as to the true meaning of the terms "railway corporation," as used in that section, the doubt must be resolved not merely by the popular definition of the term "railway," but from the general legislation respecting the same subject-matter, having in mind the evident purpose to be accomplished by these enactments. The legislation in force respecting the matter at the time of the execution of the mortgage involved in this case is comprised in chapter XXXV (incorrectly printed XXV), fifth division, Compiled Statutes of 1887. Sections 677 to 701, inclusive, of that chapter are sections 1 to 24, inclusive, of an act entitled "An act to provide for the formation of railroad corporations in the territory of Montana," passed over the Governor's veto May 7, 1873 (Laws Ex. Sess. 1873, page 93), and the most cursory examination of these sections at once discloses that none of their provisions were ever intended to apply to street railways. These sections were carried forward into the compilations of 1879 and 1887, and, in substance, are reproduced in the Civil Code of 1895 as sections 891 to 909, inclusive. The remaining sections of this chapter comprise sections 1 to 7, inclusive, of an act of the Fifteenth Territorial Legislative Assembly entitled "An act in relation to railroad corporations," approved March 3, 1887; and, in order to arrive at the legislative intent in enacting section 6 of that act, which is section 707, now under consideration, it is necessary that the entire act be considered.

Section 1 (702) provides that any railroad corporation chartered by or organized under the laws of the United States or of any state or territory, whose line of railroad shall reach or intersect the boundary line of Montana, may extend its railroad into Montana from such point, and may build branches from such point or from such extension.

Section 2 (703) provides for the consolidation of any two or more railroad corporations whose respective lines are wholly or partly within the territory of Montana, when their respective lines or any branches so connect that they may be operated together as one property.

Section 3 (704) provides that any railroad corporation whose line is wholly or partly within the territory of Montana, or reaches the boundary line thereof, may lease or purchase the whole or any part of the railroad or line of railroad of any other railroad corporation, provided that such leased or purchased line is continuous of or connected with the line of the purchasing railroad.

Daly B. & T. Co. v. Great Falls St. Ry. Co

Section 4 (705) authorizes any railroad corporation whose line is wholly or partly within the territory of Montana to issue and dispose of such amount and character of special, preferred, or full paid-up stock of the capital stock of such corporation as may be deemed advisable by its board of directors.

Section 5 (706) provides that any railroad corporation whose line is wholly or partly within the territory of Montana shall have authority and power to make, issue, negotiate, and deliver its bonds or other evidences of indebtedness, and to secure the payment thereof by mortgage or deed of trust upon all or any part of its property; and provides for the recording of such mortgage in the office of the Secretary of the Territory.

Section 6 is section 707, and is quoted above, and section 7 (708) contains the repealing clause.

The seven sections of this act herein paraphrased are carried into the compilation of 1887 as sections 702 to 708, inclusive, and include section 707, which is the subject of construction in this case. If we were to hold that the term "railroad," used in section 707 of chapter 35, above, applies to street railways because the term is sufficiently broad to include any and all graded roads on which rails of iron or steel are laid for wheels of cars to run upon, there is no apparent reason why the same term should not also be so construed wherever it is found in that chapter, and, if so, impossible conditions would be attached. For instance, under section 688 every street railway company would be required to build and complete at least 15 miles upon each of its lines, branches, or extensions every year subsequent to the filing of its articles of incorporation, until the entire system was completed, under a penalty of a forfeiture of its charter and all rights and privileges conferred by that chapter. Under section 700 such street railway companies would be required to provide comfortable and convenient cars for the transportation of passengers, baggage, express matter, and freight, and to fit its locomotives with bells and steam whistles. Under section 701 every such corporation would be required to file with the territorial auditor a report showing, among a great many other things, the length of its main track, the length of its branches and sidings, the maximum grade of its line, the shortest radius of curvature, with the length of curves in its main road, the number of wooden trestles, the length of the road unfenced on either side and the reason therefor, the number of its engines, the number of its express and baggage cars, the number of its freight cars, and very many other things, the merest statement of which is a demonstration of the absurdity of attempting to make them applicable to street railways. The terms "railroad" and "railway," as used in this chapter 35, are synonymous terms, and are generally to be found employed interchangeably. *State v. Brin*, 30 Minn. 522, 16 N. W. 406. Prior to 1895 we had no statute particularly designating the various purposes for which industrial corporations might be organized in this territory or state; but

Daly B. & T. Co. v. Great Falls St. Ry. Co

section 446 of chapter 25 designated certain purposes, and then contained this provision: "carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof." It is apparent, then, that the purpose of the act of 1887, above referred to, was to admit lines of railroad into the territory of Montana, to permit the consolidation of certain lines of railroads and the leasing and purchasing of one road by another under certain conditions, all of which was evidently intended to encourage such industrial enterprises as might aid in the development of the territory, which at that time had but few lines of railway within it; and to that end sections 4 and 5 of that act were adopted to permit such railroad corporations to issue and dispose of their capital stock, and to issue their bonds and secure the payment thereof by mortgages or deeds of trust upon their property, including the franchises, etc. And, having made these provisions, the Legislature in its wisdom added section 6, which was carried into the compilation as section 707. When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity, from the mischief felt, and the object and remedy in view. Having authorized such companies to issue their bonds and other evidences of indebtedness and to secure the payment of the same by mortgages upon their property, and the Legislature having in mind, doubtless, the known habits of such corporations to begin their operations by borrowing money and securing the payment of it by such mortgages, it then doubtless considered the danger, present or that might possibly arise, whereby a person injured by such a corporation, or one who should do work or labor for it upon its property, would be remediless when he sought to enforce collection of his claim, unless some provision was made whereby such claim, when litigated, might have preference over such mortgages or deeds of trust. This was evidently the purpose of the Legislature; and the act, if construed as a whole, makes one harmonious legislative enactment, all the provisions of which apply equally to one character of corporations, and no one provision of which can reasonably be segregated from the others and given a construction which would be out of harmony with the general purpose of the act as a whole.

As further evidence of the legislative intent in enacting section 707, above, and as indicative of the legislative use of the word "railway," it is worthy of note that at the same session of the Legislature there was passed an act entitled "An act relating to the formation of municipal corporations," approved March 10, 1887. This was a general municipal corporation act, and comprised 126 sections, which are to be found in the compilation of 1887 from sections 315 to 440, inclusive. That act embraces section 325, which undertakes to enumerate certain powers which a city council was given by that act. Subdivision 14 of this section provides that the city council has power "to regulate

Daly B. & T. Co. v. Great Falls St. Ry. Co

and control the laying of railroad tracks, and prohibit the use of engines and locomotives propelled by steam, or to regulate the speed thereof when used." Subdivision 15 authorizes the city council to require any railway, the cars of which are propelled by steam within a city or town, to light the same. Then subdivision 16 is as follows: "To license and authorize the construction and operation of street railroads and require them to conform to the grade of the streets as the same are or may be established." It is perfectly apparent, then, that the legislators, in using the terms "railroad" and "railway" in subdivisions 14 and 15, used the terms interchangeably, with reference entirely to the railways of commerce; and that when they desired to make any reference to street railroads they made use of the specific term "street railroads." There is no reason, then, to suppose that in enacting section 707 those same legislators used the term "railway" in its technical sense, for it is perfectly apparent that in enacting subdivisions 14 and 15 of section 325 they used it with reference to its popular, and, we may say, generally accepted meaning.

In *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82, the Circuit Court for the Northern District of Iowa had under consideration section 2008, McClain's Code of Iowa, which provides that "a judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, A. D. 1862." The precise question was there presented as is presented in the case at bar, and after a careful consideration of the authorities and the proper construction to be given to the legislative enactment under consideration it was held that the term "railway," as therein used, had no application whatever to a street railway. It is evident that the same argument was made before that court that was urged here—that certain of these sections, if construed apart from the others, are broad enough to include, and ought to be held to include, street railways. The court, however, disposes of that contention and the merits of the case in the following language: "The conclusions reached are that, as there is in fact a marked distinction between railroads used in the furtherance of the general passenger and freight traffic of the state and those used for street purposes only, we should naturally expect to find in the legislation of the state provisions applicable to the one class which are not applicable to the other; that an examination of the statutes of the state shows that such difference is recognized therein; that chapter 5, tit. 10, McClain's Code, is intended to embrace the provisions applicable to companies engaged in the general passenger and freight traffic; that, as that is the general purpose of the chapter, the court is not justified in excepting out of it one or two sections, and holding that they include also street railways, when the latter are not specifically

Daly B. & T. Co. v. Great Falls St. Ry. Co

named therein, and there is nothing in the context of the chapter or in the text of the original act of 1862 which shows the legislative intent to include street railways therein; that the adoption of other sections of the statute, not included in said chapter 5, which authorize the construction and operation of street railways under the control of the city or town, with special provisions in regard to right of way, and liability for injuries caused to others, shows clearly that the Legislature did not intend to include street railways within the provisions of chapter 5, tit. 10, and that the court cannot so include them." In 1895 the Supreme Court of Minnesota, in *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608, construed chapter 13, p. 69, of the General Laws of 1887 of Minnesota, which, among other things, provides that every railroad corporation owning or operating a railroad in that state shall be liable for all damages sustained by any agent or servant thereof by reason of negligence of any other agent or servant, without contributory negligence, etc., and by a consideration of the other sections of the same act reached the conclusion that the provision above referred to has no application to street railways. In 1898 practically this same case was before the Circuit Court of Appeals. This appellant, Hamilton, having secured her judgment in the district court, went into the federal court in a suit in equity to enforce her judgment against the property of the Great Falls Street Railway Company, and sought to have the same established as a lien prior to the lien of mortgage or deed of trust now under consideration. The Circuit Court of Appeals considered the provisions of section 707 as well as the other sections of chapter 35, above, reviewed the authorities at great length, and reached the conclusion that section 707 has no application whatever to street railways. *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46. In 1903 this same section 707 again came before the Circuit Court of Appeals for consideration in the case of *Central Trust Co. v. Warren*, 121 Fed. 323, 58 C. C. A. 289. Warren secured a judgment for personal injuries sustained by him against the Helena Power & Light Company, upon which the Central Trust Company held a mortgage or deed of trust given prior to the date of Warren's judgment. In a suit in equity to foreclose that mortgage Warren was made a party defendant. He pleaded his judgment, and sought to have the lien of the judgment declared prior and superior to the lien of the mortgage, and Knowles, District Judge, so held, and entered a decree providing for the foreclosure of the mortgage, for a sale of the property thereunder, and for the satisfaction of Warren's judgment before anything was applied towards the satisfaction of the debt secured by the mortgage. On appeal to the Circuit Court of Appeals this judgment was reversed, and it was again held that section 707 has no application to street railways.

Osgood v. Central Vermont R. Co

While these adjudications by the federal courts are not controlling with us, on account of the high character of the courts they are persuasive, and the reasons given by them seem in this instance conclusive. As the proper construction of this section is the only question before us, we are of the opinion that it cannot be held to embrace street railways, and that the district court committed no error in rendering judgment upon the pleadings. The judgment is therefore affirmed.

Affirmed.

BRANTLY, C. J. and MILBURN, J., concur.

OSGOOD v. CENTRAL VERMONT R. CO.

(Supreme Court of Vermont, Orange, March 9, 1905.)

[60 Atl. Rep. 137.]

Contracts — Legal and Illegal Promises — Enforcement. — Where there is a promise to do two things, one legal and the other illegal, the promise to do the legal act will be enforced, and the promise to do the illegal disregarded, irrespective of whether there are two distinct promises, or whether there is one promise that is divisible, or whether the consideration for the two promises is entire and apportionable.

Lessee Contracting to Indemnify Lessor Railroad against Negligence—Severable Contract—Statutory Prohibition—Public Policy. — V. S. 3924, provides that, when any engineer or other agent of a railroad is guilty of negligence whereby an injury is done to a person or corporation, he shall be imprisoned or fined, but that the statute shall not exempt a person or a corporation from an action for damages. Plaintiff, to whom defendant railroad company leased a piece of its roadway for a site for a coal and lumber shed at an annual rental, agreed to indemnify defendant from all liability for loss or damage to himself, his property or servants, occasioned by the negligence of defendant's servants. Held, in an action for negligently running an engine against a shed built on the premises pursuant to the lease, that the implied inhibition to contract did not extend to injuries in which the public has no interest, and that part of the contract covering the injury, being severable from the rest of the contract of indemnity, was enforceable.

Same—Same—Same—Same. — The promise of indemnity involved in the action was not unenforceable as contrary to public policy.

Exceptions from Orange County Court; John W. Rowell, Judge.

Action by Arthur G. Osgood against the Central Vermont Railroad Company. Judgment in favor of plaintiff, and defendant brings exceptions. Judgment reversed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

M. M. Wilson and *E. M. Harvey*, for plaintiff.

C. W. Witters, for defendant.

ROWELL, C. J. The case is this: The defendant leased to the plaintiff for five years a piece of its roadway for a site for a coal

Osgood v. Central Vermont R. Co

and lumber shed, at an annual rent of \$15, payable in advance, in consideration of which the plaintiff agreed to pay said rent, and to indemnify and save harmless the defendant from all liability for loss, damage, or injury to himself, his property, servants, or agents, while upon or about said premises, occasioned by fire or otherwise, resulting from the negligence of the defendant, its servants, agents, or in any other manner. The action is for negligently running an engine and a car off a spur track and against the plaintiff's shed, built upon said premises pursuant to said lease, thereby wrecking the same, and breaking and destroying divers wagons and other carriages stored therein.

The plaintiff claims that said contract is in contravention of section 3924 and 3926 of the Vermont Statutes, and also against public policy, and therefore illegal and void. Section 3924 provides that when an engineer, fireman, or other agent of a railroad is guilty of negligence or carelessness whereby an injury is done to a person or corporation, he shall be imprisoned not more than a year, or fined not more than a thousand dollars, but that the section shall not exempt a person or a corporation from an action for damages. As the inhibition to contract implied by this section, whatever it is, cannot extend beyond its penalization, it is important to determine whether it penalizes the injury complained of. Conceding for present purposes that it penalizes all injuries in which the public has an interest, does it penalize injuries in which the public has no interest, but which are wholly of private concern? This depends upon the construction to be given to it, for its language is broad enough to include all injuries, regardless of the interests they touch.

Penal statutes are to be strictly construed, though not so strictly as to defeat their purpose. They are, like other statutes, when not too plain and specific for construction, to be construed with reference to their spirit and reason; and courts have power to declare that a case that falls within their letter is not within the statute, because not within its spirit and reason and the intention of the Legislature. The Supreme Court of Pennsylvania says (quoting somebody) that "no man incurs a penalty unless his act is clearly within both the spirit and the letter of the statute imposing the penalty." *Commonwealth v. Wells*, 110 Pa. 463, 468, 1 Atl. 310, 312. The Supreme Court of Maryland said much the same thing in *Cearfoss v. State*, 42 Md. 403. There are many forcible illustrations of the application of this rule. Puffendorf mentions a case in the Bolognian law in which it was adjudged that an enactment that "whoever drew blood in the streets should be punished with the utmost severity" did not apply to a surgeon who bled a man that fell down in the street in a fit. Blackstone says that the most universal and effectual way of discovering the true meaning of a law is, when the words are dubious, by considering the reason and spirit of it, or the cause that moved its enactment, and instances a case put by Cicero—of a law that those who in a storm, forsook the ship,

Osgood v. Central Vermont R. Co

should forfeit all property therein, and that the ship and the lading should belong entirely to those who stayed in it. In a tempest, all forsook the ship except one passenger, who was too sick to leave it. By chance the ship came into port, and the sick man kept possession, and claimed the benefit of the law. But all the learned agreed that he was not within the reason of the law, which was to give encouragement to such as should venture their lives to save the ship, and that this was a merit to which the sick man could not pretend, for he stayed in the ship neither to save it nor to contribute to its safety. 1 Bl. Com. 61. The statute of 1 Edward II enacted that a prisoner who broke prison should be guilty of felony. But it was held not to extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Plowden says in his comments on *Stradling v. Morgan*, at page 205a, as the result of many cases to which he refers, that: "The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend to but some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only—which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the statute, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." This agrees with Coke, who somewhere says that "he who knoweth not the reason of the law knoweth not the law itself." And again he says that "acts of Parliament are not to be so construed as no man that is innocent or free from wrong be by a literal construction punished or endamaged." In *Murray v. Baker*, 3 Wheat. 541, 4 L. Ed. 454, the words "beyond seas," copied from an English statute, were construed to mean "without the limits of the state."

In *The Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, it was held that the penal act of February 26, 1885 (23 Stat. 332, c. 164 [U. S. Comp. St. 1901, p. 1290]) "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor" in this country, does not apply to a contract between an alien resident out of the United States and a religious society incorporated under the laws of a state, whereby the alien engaged to remove to this country and enter into the service of the society as its rector and pastor, and removed and entered into the service accordingly. The court said that the society was within the

Osgood v. Central Vermont R. Co

letter of the statute, for not only were the general words "labor and service" both used, but, as if to guard against any narrow interpretation, and to emphasize a breadth of meaning, to those words is added "of any kind," and, further, that as the statute made specific exceptions, and among them professional actors, artists, lecturers, singers, and domestic servants, it thereby strengthened the idea that every other kind of labor and service was intended to be reached, and that, while there was great force in this reasoning, the court could not think that Congress intended to denounce with penalties a transaction like the one in that case. The court went on to say that it is a familiar rule that a thing may be within the letter of a statute, and yet not be within the statute, because not within its spirit or the intention of its makers; that this is not the substitution of the will of the court for that of the Legislature, for frequently words of general meaning are used in a statute, broad enough to include the act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results that would follow from such a broad meaning, makes it unreasonable to believe that the Legislature intended to include the particular case.

It is said in *Ryegate v. Wardsboro*, 30 Vt., at page 749, that the letter of the law is found by experience not to be in all cases a correct guide to the true sense of the lawgiver, wherefore rules have been adopted for the construction of statutes that look to the whole and every part of the act, to the subject-matter, the effects and consequences, the reason and spirit of the law, and thus ascertain the true meaning of the Legislature, though the meaning ascertained conflicts with the literal sense of the words. Chief Justice Marshall says in *United States v. Fisher*, 2 Cranch, 358, 386, 2 L. Ed. 304, that, when the mind labors to discover the design of the Legislature, it seizes everything from which it can derive aid.

Applying this doctrine to the case in hand, we think that section 3924 does not extend to injuries in which the public has no interest, but which are wholly of private concern. Said section is a part of the railroad law that applies exclusively to "operating railroads" and contains many specific provisions on that subject, most of which were manifestly enacted for the safety, protection, and general benefit of the public, and apparently without reference to merely private matters in which the public has no interest; leaving those to be dealt with by the common law, the same as in other cases. Suppose, for example, that sectionmen should negligently and carelessly run a hand car over and injure a trifling thing, of no public interest; or, if sectionmen are not within the statute, suppose an engineer should negligently and carelessly run his engine over and injure such a thing, incapable of injuring the train—would they incur the penalty? If so, it would be because the act came within the spirit and reason of the law as well as within its letter, and be-

Osgood v. Central Vermont R. Co

cause such a construction would be necessary in order to accomplish the object and purpose of the law, and to effectuate the intention of the Legislature. But this seems too much to say. Hence the language of the statute, which comprehends all injuries, must, as Plowden says, be expounded to extend to but some injuries. But where shall the line be drawn? It cannot be drawn arbitrarily, for that is not exposition. It must, then, be drawn with reference to some difference that bears a just relation to the object and purpose of the statute; and this difference is found between injuries in which the public has an interest, and injuries in which it has no interest, but which are purely of private concern; and that the injury here in question is purely of private concern cannot be doubted, for it is nothing to the public whether the plaintiff or the defendant bears this loss, concerning which the defendant was not contracting in its public capacity of a common carrier, but only in its private capacity.

It follows, therefore, that, if that part of the contract covering the injury here involved stood alone, the contract would not be in contravention of section 3924. But as it does not stand alone, but is part of a promise to indemnify against injuries in which it is claimed the public has an interest, it is contended that the whole promise must fall, as it is not divisible. The general rule is, where you cannot sever the illegal from the legal part of a contract, that the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, that you may reject the bad and retain the good. It was unanimously agreed in 14 H. 8, 25, 26, that if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful, the covenants or conditions that are against law are void *ab initio*, and the others stand good. This was adopted in *Pigot's Case*, 11 Coke, 26; and from it has sprung the generally accepted doctrine that where there is a promise to do two things, one legal and the other illegal, the promise to do the legal act will be enforced, and the promise to do the illegal act will be disregarded. *United States v. Bradley*, 10 Pet. 343, 360, 9 L. Ed. 448. And it makes no difference whether there are two distinct promises, or whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable. *Greenwood v. Bishop of London*, 5 Taunt. 727, 381-82; *Newman v. Newman*, 4 M. & S. 66; *Harriman on Cont.* 134. One of the most common instances of the application of this rule is in cases of agreements in restraint of trade, which are held to be divisible both as to time and place. *Baines v. Geary*, L. R. 35 Ch. D. 154, is a case of the former kind. There, in an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customers served by, or belonging at any time to, the master, his successors or assigns. Held, severable, and capable of enforcement in respect of persons who were customers during the employment. There are many cases of the latter

Osgood v. Central Vermont R. Co

kind. In *Price v. Green*, 16 M. & W. 346, the covenant was never to carry on a certain business in the cities of London or Westminster, nor within 600 miles of them. Held, that the covenant was divisible, and good as to those cities, but bad as to the 600 miles. A covenant not to engage in the manufacture of ocher "in the county of Lehigh or elsewhere" is divisible, and good as to the county. *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251. A contract not to engage in a particular trade or business for a specified time "in the City of St. Louis nor at any other place" is divisible. *Peltz v. Eichele*, 62 Mo. 171. So a covenant not to enter into a certain business in a certain county, nor, for a time, into the same business in the United States, is good as to the first, though bad as to the last. *Dean v. Emerson*, 102 Mass. 480.

It is to be noticed that the consideration for the plaintiff's promise in the case at bar is wholly legal, and has been practically executed by allowing the erection and use of the structure. Under the rule above stated, that part of the plaintiff's promise of indemnity here involved is severable from the rest of the promise, and enforceable, not being in contravention of the statute, unless it is against public policy, which the plaintiff claims, but which we do not think. It is said in *Griswold v. Illinois Central R. R.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647, that "public policy is variable; that the very reverse of that which is the policy of the public at one time may become public policy at another time, and hence no fixed rule can be given by which to determine what is public policy; that the authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society." It is said by Mr. Justice Gray in *Hartford Ins. Co. v. Chicago, etc., Railway Co.*, 175 U. S., at page 106, 20 Sup. Ct. 33, 44 L. Ed. 84, that this is in exact accord with the opinion in *Pope Manufacturing Co. v. Gormully*, 144 U. S., at page 233, 12 Sup. Ct. 632, 36 L. Ed. 414. Sir George Jessel, Master of the Rolls, says in *Printing Co. v. Sampson*, L. R. 19 Eq., at p. 465, that: "It must not be forgotten that you are not to extend arbitrarily those rules that say that a given contract is void as being against public policy, because if there is one thing that, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and be enforced by courts of justice. Wherefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." This language is quoted and approved in *Baltimore & Ohio, etc., R. Co. v. Voight*, 176 U. S., at page 505, 20 Sup. Ct. 387, 44 L. Ed. 560, where it is further said that "the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is to maintain and enforce contracts, rather than to en-

Osgood v. Central Vermont R. Co

able parties thereto to escape from their obligation on the pretext of public policy."

A railroad corporation holds its stations, grounds, railroad tracks, and right of way for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others in the manner that it may consider best fitted to promote or not to interfere with the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for receiving and delivering freight upon its road, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railway Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356. And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73. But it is not obliged, and cannot be compelled, even by statute, against its will, to permit private persons to erect and maintain structures for their own benefit upon the land of the company. *Missouri Pacific Railway Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. In the case at bar the plaintiff had no right to build his shed upon the land of the defendant without its permission, and it was under no obligation to the public or to the plaintiff to permit him to do it. In granting and receiving the permission to do it, and in erecting it, both parties knew that its proximity to the spur track, the building of which was contemplated, would increase the risk of damage by cars running off that track accidentally or by negligence. The principal consideration expressed in the lease for the license granted is the stipulation for exempting the defendant from liability to the plaintiff for damage thus occasioned, and the public had no interest in that matter. In *Griswold v. Illinois Central Railway Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647, it was held that a stipulation in a contract in which a railroad company permitted a building to be erected on its right of way wherein to do business with the public, that the company should not be liable for damage by fire negligently communicated by it to the building, did not contravene public policy, because the public had no interest as to who should carry the hazard incident to the buildings being located as it was. *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17, is to the same effect. There the defendant leased to the plaintiff land adjoining its depot grounds on which the plaintiff had built a warehouse. He covenanted in the lease that the company should not be liable to him for damage caused by fire from its engines or otherwise. Held, that he could not recover for the destruction of the warehouse by fire spreading from the company's adjoining land, negligently kindled thereon by its servants for the purpose of burning dry grass and rubbish, and that the covenant did not contravene public policy, nor, as the court said, did it increase the risk and danger to the public by tending to promote negli-

Osgood v. Central Vermont R. Co

gence. This may with equal truth be said of the case at bar. It is not like the Tarbell Case, 73 Vt. 347, 51 Atl. 6, 56 L. R. A. 656, 87 Am. St. Rep. 734, for there the negligence stipulated against touched the interest of the public, as the public has an interest in the personal safety of railroad operatives. In the very recent case of Mann v. Pere Marquette R. Co., decided by the Supreme Court of Michigan, and found in 97 N. W. 721, the plaintiffs were lumbermen, and owned a large mill. Desiring to have side tracks laid thereto for shipping in and out products, they applied to the defendant to put them in, and thereupon a contract was entered into whereby the company agreed to build the tracks, and the plaintiffs, recognizing that the use of them involved risk of loss by fire from engines, assumed, as a further inducement and consideration for their construction, all such risk of fire, and released the company from all liability, statutory or otherwise, for loss or injury to them by fire, whether due to the negligence of the company or its employees or otherwise. The court said that the case did not fall within those where contracts to exempt from liability are held void on the ground of public policy; that it is a fundamental rule that what one may refuse to do entirely, he may agree to do upon such terms as he pleases; that the defendant was not acting as a public carrier, and was not bound to put in the tracks; that there was no occasion to contract against property equipped and properly managed engines, for fire caused by such would not impose liability; and that the only purpose of such a contract was to avoid the consequences of the defendant's own negligence, which it had a perfect right to contract against, both in reason and on authority. These cases are not so strong as the one at bar, for the fires there stipulated against might have spread and endangered the public, while the cause of the injury here involved necessarily spent itself with the injury.

As the promise is divisible, we have no occasion to consider whether the rest of it is against public policy or in contravention of either of said sections, the last of which provides that those owning or operating a railroad shall be responsible in damages for injuries by fire communicated by engines, unless due caution and diligence are used, and suitable expedients employed, to prevent such damage. We hold, therefore, that that portion of the contract applicable to the injury in question is not against public policy or in contravention of said sections, but is good and enforceable against the plaintiff.

Judgment reversed, and judgment for the defendant to recover its costs.

VILLAGE OF PLYMOUTH v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, March 21, 1905.)

[102 N. W. Rep. 947.]

Highways—Railroad Crossings—Condemnation—Damages—Elements—Police Regulations—Compliance—Opening Trains.*—In proceedings to condemn a highway across a railroad's right of way the railroad, though entitled to compensation for necessary structural changes, and for any direct expense incurred, is not entitled to compensation for the observance of public regulations requiring railroads to open trains at crossings to admit of teams passing over its tracks if such trains occupy the street longer than a specified time.

Appeal from Circuit Court, Wayne County; George S. Hosmer, Judge.

Proceedings by the village of Plymouth against the Pere Marquette Railroad Company to condemn a right of way for a street across defendant's track. From a judgment awarding defendant a certain sum for damages, it appeals. Affirmed.

Argued before MOORE, C. J., and CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ.

Paul W. Voorhies (*Harry Helfman*, of counsel), for petitioner.

Frederick W. Stevens (*Charles McPherson*, of counsel), for respondent.

MONTGOMERY, J. This is a review of a proceeding taken by the petitioner to condemn a right of way for a street across the defendant's track. The jury determined that the opening of the street was a necessary public improvement, and awarded the respondent damages to the amount of \$382.64. The respondent brings the case here for review, contending that the circuit judge erred in his instructions to the jury as to the proper items to be considered in awarding damages.

It appears that at the point where the proposed street crosses the respondent's tracks there are three tracks. The center track is the main track for trains between Toledo and Saginaw. The east track curves to the right, and connects the main track to Toledo with the main track to Detroit. The west track is known as the "south lead track," and extends to the yard and the engine house. The testimony tended to show that the south lead track and the Detroit "Y" are used for storing through trains while the locomotives are being supplied with coal and water and while the trainmen are waiting orders to proceed, and that upon the opening of this street, if the present method of operating trains continues, it will be necessary to open certain of defendant's trains in order to avoid an obstruction of the new street for more

*See note appended to *Chicago, etc., Ry. Co. v. Milwaukee* (Wis.), 9 Am. & Eng. R. Cas., N. S., 537.

Plymouth v. Pere Marquette R. Co

than five minutes at a time, and that this will cause some delay and some additional expense in the operation of the road. It is contended by the respondent: First, that the damages caused by this delay and expense in opening trains is a proper item to be awarded to it in these proceedings; and, second, that, while the circuit judge was of this opinion, his charge was given in such form as to impress upon the jury his individual view that no tangible damages were shown, and that in this there was error. The petitioner's counsel takes issue with the appellant on both propositions, and contends, first, that such damages as the respondent may sustain in the operation of its road by being required, in pursuance of police regulations, to open its trains to admit of teams passing across its tracks in the proposed street, are *damnum absque injuria*, and insists, second, that the circuit judge not only gave the rule contended for by respondent's counsel, but that his charge is not subject to the criticism made. Manifestly, the question of first importance is whether the railroad company is entitled to compensation for the inconvenience to which it will be put in operating its trains so as to admit of the use of the new street as a highway. This precise question has never been determined by this court. It is undoubted that in case of a condemnation of a right of way across a railroad the company is entitled to compensation for structural changes made necessary, and also for any direct expense made necessary by the fact of the street opening, as in maintaining a flagman, or gates, or cattle guards. *Grand Rapids v. R. R. Co.*, 58 Mich. 641, 26 N. W. 159; *Commissioners v. R. R. Co.*, 91 Mich. 291, 51 N. W. 934; *Commissioners v. R. R. Co.*, 90 Mich. 385, 51 N. W. 447; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; *Railway Co. v. Hough*, 61 Mich. 507, 28 N. W. 532. On the other hand, it is well settled that compensation for the observance of public regulations cannot be demanded. 3 Elliott on Railroads, § 1103; *Railway Co. v. Railway Co.*, 118 Mo. 599, 24 S. W. 478; *Railway Co. v. Railway Co.*, 30 Ohio St. 604; *Railway Co. v. Railway Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Railway Co. v. Railway Co.*, 105 Ill. 110; *Railway Co. v. Railway Co.*, 64 Mich. 350, 31 N. W. 281. The question is whether the inconvenience occasioned the respondent by opening the street in question falls within the first class or the latter. It is conceded by counsel for the respondent that, if the damage caused by cutting the trains arises out of a necessity to observe a mere police regulation, such damages are *damnum absque injuria*, but it is contended that the cutting of trains at this point is not merely prohibited by a police regulation, but that any use of the street by the company which would unreasonably obstruct the same could, in the absence of any statute, be prevented, or the injury resulting therefrom could be redressed. It is true that any unreasonable obstruction of a street may constitute a nuisance, but we think it does not follow that statutory regulations of the joint use of streets by a railroad company and

Southern Pac. R. Co. v. San Francisco Sav. Union

the public may not, in a sense, be treated as a police regulation. In the present case the damages were sought to be measured by the loss of time and the increase of expense because the company would be precluded from occupying the street more than the time fixed by statute. The measure assumed was not what might, under any circumstances, be reasonable. We think the case ought not, in this respect, to be distinguished from *Railway Co. v. Railway Co.*, 64 Mich. 350, 31 N. W. 281. In that case it was sought to recover damages which would result from being compelled to stop the trains of the respondent's road before crossing the track of the petitioning road. The question was ably discussed in an elaborate opinion by Mr. Justice Champlin, and the conclusion was reached that such damages could not be recovered. It was held that the company was not entitled to compensation for obeying a police regulation, and it was said: "These are police regulations, enacted by the Legislature, designed to promote the public safety, and are as binding upon an existing road as one newly organized. They stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements. It is subject to amendment or repeal at any time the Legislature may see fit, and for this reason, as well as for the absolute impossibility of determining in advance the number of trains which in the future operation of the road would be required to stop at such crossing, the damage arising therefrom is uncertain and conjectural. But, aside from this, any inconvenience or annoyance or loss suffered in obeying the police regulations of the sovereign authority is *damnum absque injuria*." Much of this reasoning applies with peculiar force to the case before us. The Legislature may repeal the statute fixing the five-minute rule at will, or may change that limit so as to remove any inconvenience to respondent, and to this extent that regulation is a police regulation. We think this element of damages should have been eliminated from the case, and it follows that there was no error to the prejudice of respondent.

The order is affirmed, with costs.

SOUTHERN PAC. R. CO. v. SAN FRANCISCO SAV. UNION et al.

(Supreme Court of California, Feb. 16, 1905.)

[79 Pac. Rep. 961.]

Eminent Domain—Condemnation Proceedings—Valuation of Property—Separation of Easement and Fee.—Where there is no substantial difference between the value of the fee and the value of the easement to be taken by condemnation proceedings, the value of the fee may be proven and assessed as damages; but where it can be shown as a fact that the fee, burdened with the easement, is of some substantial value to the owner, as where the underlying estate is valuable for the minerals it contains, this value is reserved to the

Southern Pac. R. Co. v. San Francisco Sav. Union

owner, and must be taken into consideration in determining the damages to be awarded for the imposition of the easement upon the land.

Same—Railroad Right of Way—Right to Minerals and Oils.—A railroad acquires by condemnation proceedings the permanent and exclusive control of the surface of the land, but acquires no title to minerals or oils beneath the surface, and no right to appropriate them; but such right remains in the owner of the fee subject only to the obligation of supporting the railroad's easement.

Same—Same—Same—Separation of Easement and Fee.—Where an easement over oil land is condemned to be used as a right of way for a railroad, the railroad must pay the full value of the fee as oil land, if the reservation to the owner of the fee of oil rights is rendered of no value because of the railroad's appropriation of the surface; but the railroad may show, if possible, that a beneficial ownership in the oils underlying the right of way is reserved to the owner of the fee, and, if it makes such showing, the value of the beneficial ownership must be taken into consideration as something separate from the value of the easement, and the value of the easement alone be assessed as damages.

Same—Mineral and Oil Lands—Value—Expert Testimony.—In proceedings to condemn a right of way over oil fields, an expert may testify as to matters which would influence him from the standpoint of a contemplating buyer in determining the market value of the land in an oil-bearing territory, the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom, and the general relation of outlay to income; and such testimony is not objectionable as conjectural and speculative.

Same—Same—Same—Same.—But further testimony of the witness that he would take into consideration what "he could pay for it and have sufficient margin for speculation during at least five years" is incompetent on the issue of market value.

Testimony—Motion to Strike.—A motion to strike out testimony was properly denied, where part of the testimony subject to the motion was proper, although another part was improper.

Condemnation Proceedings—Mineral and Oil Lands—Value—Evidence.—In proceedings to condemn a right of way over oil-bearing lands, it is permissible to show, on the issue of value, a progressive decrease in the productiveness of the field within which the land in question is situated.

Department 2. Appeal from Superior Court, Santa Barbara County; William S. Day, Judge.

Condemnation proceedings by the Southern Pacific Railroad Company against the San Francisco Savings Union and another. From an order denying a new trial, plaintiff appeals. Reversed.

Canfield & Starbuck, for appellant.

Richards & Carrier, for respondent.

LORIGAN, J. This action was brought to condemn a right of way for a relocated railroad of plaintiff in the county of Santa Barbara. The strip sought to be condemned consisted of about two-thirds of an acre of land belonging to the defendant corporation. This strip lay along the southern boundary of a larger tract, several acres in extent, belonging to the same owner, and located within the exterior limits of the Summerland oil field, or district, in which the oil flows naturally from higher or shallower to lower or deeper wells. The defendant Becker has an

Southern Pac. R. Co. v. San Francisco Sav. Union

interest in both pieces of property under a contract with the defendant corporation.' The case was tried before a jury, and, all issues having been waived except as to the value of the property taken, the evidence in the case was limited solely to that question, and, being submitted to the jury, a verdict was rendered in favor of defendants. The plaintiff moved for a new trial, and from the order denying it appeals.

The main point on this appeal relates to the proper measure of value which should be applied in a suit to condemn land of the character involved here, namely oil land—whether an easement acquired over a strip of oil-bearing land, part of a larger tract of the same character owned by the same person, is equivalent to taking the fee, and must be paid for as of the value of the fee, or may it, when applied to such land, be an interest different in law from the fee, having a substantially different value, and to prove which the defendant should be permitted to introduce evidence? The lower court held, as a matter of law, that in condemning a right of way over this strip of land, part of a larger tract of oil-bearing land, there could be no difference in value between the easement and the fee, and, not only, over plaintiff's objections, permitted defendants to address their evidence solely to the value of the fee, but instructed the jury that defendants were entitled to have an award to that extent. It was insisted by the plaintiff upon the trial that it sought, and under the law was entitled to condemn, only an easement in the property, and endeavored, by cross-examination of defendants' witnesses and by witnesses produced upon its own part, to show that there was, in fact, a substantial difference in value between the fee in this land and the easement it sought to condemn for a right of way across it. The court refused to permit them to make this showing, and under all these rulings the question whether the court was correct as to the measure of value it applied, is presented.

While it is no doubt true that under the law of this state a railroad company is only entitled to acquire by condemnation proceedings an easement over the land, and that the fee thereof remains in the owner, yet in most condemnation cases by railroad companies this distinction, as far as it enters into a determination of the damages to be assessed for the right of way acquired thereby, has no practical application. Usually in such cases there is no substantial difference in value between the easement and the fee of which the law will take notice. Hence, in ordinary cases, where condemnation for a right of way for railroad purposes is sought, evidence is permitted to show, as the damages sustained, the full value of the land taken, upon the theory that the easement will be perpetual; that the right of way acquired, though technically an easement, will be permanent in its nature, and the possibility of abandonment by nonuser so remote and improbable as not to be taken into consideration; that the exercise of the right will require practically the exclusive use of the surface; and that any interest which might be reserved to

Southern Pac. R. Co. v. San Francisco Sav. Union

the owner in the fee would only be a nominal one and of no value. Under such circumstances, as there can be no substantial determinative value in the fee apart from the easement, the law will not consider them separately, but will require the condemning corporation to pay the value of the fee as the measure of damages sustained. To illustrate: Where a right of way is condemned over agricultural land or over building lots, this is in effect to take the entire value of the land. In either case the underlying ground upon which the easement is imposed can be of no value to the owner. The sole value of such lands consists of the use to which the owner could devote the surface—to cultivation or building—and, when he is deprived of that use, the entire value of the land is taken from him, and hence, for all beneficial purposes to the owner, there can be no difference in value between the easement and the fee. They are substantially identical in value. And to illustrate further: If the whole of a tract of mineral land is to be condemned, whether such mineral has a fixed situs, such as gold, iron, or coal, or the land overlies minerals of a fugitive and wandering nature, such as petroleum oil or natural gas, which may be drawn from it, the same rule for determining the easement taken would apply. As these minerals can only be reached from the surface, when all the surface is taken from him, the owner is deprived of the entire value of his land. A reserved ownership in the minerals would be merely nominal, and of no advantage or benefit to him. So that, in all these cases which we have instanced, it would be idle to endeavor to distinguish, in assessing damages, between the value of the easement and the value of the fee, because, in the nature of things, there is no real difference between them. When the easement is taken, the fee is substantially taken, and for all practical purposes in measuring damages the value of the fee is the only available and proper standard.

But, while it is the rule that, where there is practically no substantial difference between the value of the fee and the value of the easement, the court may properly permit the value of the fee to be proven and assessed by the jury as the damages, yet in theory the distinction between the two remains, and in all cases, where it can be shown as a fact that the fee, burdened with the easement, is of some substantial value to the owner, this value is reserved to him, and must be taken into consideration in determining the damages to be awarded for the imposition of an easement upon the land. In condemning for a right of way, no more land and no greater interest in it can be taken by the railroad company than the public use requires, which is ordinarily the surface of the land. While it is true, as we have pointed out, that under some circumstances, in assessing damages, the value of the fee of the land taken is awarded, yet this is because in the nature of things there can be no difference in value between them. When, however, such a difference does exist, the rule is different, and the value of the easement taken, as distinguished from the

Southern Pac. R. Co. v. San Francisco Sav. Union

value of the fee, is alone to be ascertained by the jury, and the owner compensated therefor. And this difference in value may, and usually does, exist to a greater or less degree in all cases where the underlying estate is valuable for the minerals it contains, and when but a portion of the owner's land which contains them is burdened with the easement. Whatever minerals lie beneath the right of way are reserved to the owner, and wherever such minerals are in situ underlying this right of way, while he may not enter upon it to take them (because the nature of the easement requires exclusive possession of the surface by the company), he can drift from tunnels sunk upon his adjoining land and do so, leaving, however, sufficient support for the easement imposed. Subject to this support, the right of the owner of the land, to take out all the minerals beneath the right of way, is absolute. Under the condemnation the railroad company acquires the permanent and exclusive control of the surface of the land, but it acquires nothing more. It acquires no title to the minerals beneath the surface, and, of course, no right to dig beneath the surface for the purpose of appropriating them, and, if it should undertake to do so, could be restrained at the instance of the owner of the underlying fee. While the title to the minerals underneath the right of way is reserved exclusively to the owner of the land across which it is condemned, there is no doubt that, by being restricted from entering upon it, it may be much more difficult and expensive for him to take them out, far more so than if he could operate directly over the land which has been appropriated under the easement; and it may be that much valuable mineral would have to be left to afford surface support, or, if this were taken out, a substituted surface support would have to be provided by the owner. But evidence of all these matters would be submitted to the court and jury, and would enter as substantial facts in determining the value of the easement. They would not affect his reserved right of ownership in the fee. While our attention has not been directed to any decision of this court adopting this as the rule in this state to be applied in assessing damages for the condemnation of a right of way over mineral lands, the authorities seem to be quite uniform upon the point in other jurisdictions, as far, at least, as lands containing mineral in situ are concerned, and the rule seems to be a reasonable and just one. Some of these authorities we cite: *Robbins v. St. Paul S. & T. R. R. Co.*, 22 Minn. 287; *Hollingsworth v. Des Moines & St. L. R. R. Co.*, 63 Iowa, 444, 19 N. W. 325; *Tyler v. Town of Hudson*, 147 Mass. 609, 18 N. E. 582; *Blake v. Rich*, 34 N. H. 289; *Phifer v. Cox*, 21 Ohio St. 255, 8 Am. Rep. 58; *Penn Gas Co. v. Versailles Fuel Gas Co.*, 131 Pa. 532, 19 Atl. 933; *North Pac. & M. R. Co. v. Forbis*, 15 Mont. 459, 39 Pac. 571, 48 Am. St. Rep. 692.

But the particular question presented in this case, as to the proper measure of value which should be applied where an easement is sought over oil-bearing land, seems never to have been

Southern Pac. R. Co. v. San Francisco Sav. Union

presented for determination to any court. At least our attention is called to no decision on the subject, and counsel upon both sides have been extremely thorough in the presentation and discussion of the subject. Counsel for appellant, reasoning from analogy, insists that the same rule should apply to oil lands as to other mineral lands, while counsel for respondents claim that there is no room for such application, and that there is such a radical and essential difference, both as to the character of the minerals and the nature of their ownership, as to make the rule inapplicable. But we do not think this difference in ownership, or the character of the minerals, of such a nature as to make it impossible that an owner of adjoining land can derive any benefit from a reservation in his favor of the petroleum oils in place, or which are liable to accumulate, by reason of the physical laws governing such fluids, under the land upon which the easement is imposed. Nor can it be said that it is impossible to show, in ascertaining the value of the easement acquired, that this reserved right has no determinative value separate from the easement. These oils lie in reservoirs, and, collectively, the owners of the superincumbent land have an exclusive ownership in them. The ownership of each, it is true, is only a qualified or partial ownership—a right to reduce the oil in the common reservoir to possession by sinking wells upon the particular tract of land owned by him overlying it. But, when so being exercised, the owner of the well is not limited to any particular territorial area beneath the surface from which he may draw the oil. He may not only draw from his own land, but he is entitled to draw from the reservoir generally, and he naturally does draw, and is of right entitled to draw, to his own well the oil underlying the lands of other surface owners. This, of course, is a right common to all surface owners, and, as the reservoir is not inexhaustible, there is a liability that in the process of pumping the oil beneath the lands of proprietors higher upon the strata will be naturally diminished, if not depleted, by being either drawn out, or by gravitation carried to lower and deeper wells. But, aside from this liability to loss from beneath particular lands, the ownership in the oil beneath that land may be said to be absolute in the owner of the surface; and if his right to take it out is not lost by virtue of being deprived of a part of his surface land, or his beneficial interest is only to some extent diminished, there is no reason why a corporation condemning a right of way across it, which takes only an easement, should pay for this reserved and available interest in the fee. That this reserved interest in the oil under the right of way was of a determinative value to the defendants, as owners of the adjoining land, was what the plaintiff sought to prove. Its contention was that, as such owners, it was possible for defendants to take out, by wells sunk along the border of the adjoining land, the oil in place beneath the strip composing its right of way, and by means of such wells to intercept the flow of oil from such adjoining land

Southern Pac. R. Co. v. San Francisco Sav. Union

beneath the easement surface; and to the extent that this might be accomplished it offered to show that this right was of value, as something distinct and apart from the value of the easement, and we perceive no reason why it should not have been permitted to do so.

It is contended, however, by the respondents, that whatever ownership the defendants may have in the oil beneath the right of way could only be made available from the surface; that ownership of the surface carries with it the only right in the oil which is of any value, and that is the right to reduce to possession the oil beneath that surface; and that if, by putting down wells on the land adjoining, they can draw out the oil from beneath the right of way, they do not acquire such oil by virtue of any ownership they have in it as taken from the land subject to the easement, but they get it by virtue of their rights in the surface of the adjoining tract through which it is drawn. We cannot accord with this line of argument. We do not think it keeps in view a proper distinction between the qualified ownership of a surface owner of land in the general oil deposits contained in the reservoir, and the like ownership which attaches to the specific quantity which from time to time may be under the surface of a particular tract of land. While, collectively, all the owners of the superincumbent land have a common interest in the oil deposit, yet the right of an owner of the surface of a particular tract of such land to reduce the oil under it to possession can only be enforced when it comes under his land. If he can then reduce it to possession by drawing it from under all his land, notwithstanding his right to operate from a portion of the surface of such land for that purpose may be prevented by the imposition of an easement upon it, he retains the same right and to the same extent as he possessed it before the easement was imposed, and there necessarily would be a difference between the value of the reserved right and the value of the easement. It is true that usually the surface taken for a right of way would be the most advantageous point from which to draw the oil from beneath it; but, in the case instanced, it would not be essentially requisite. It might entail greater difficulty, and be attendant with less practical benefit and advantage for the owner of the adjoining land, who retains this beneficial ownership in the oil underlying the right of way, to operate, in acquiring its possession, from the adjoining land, than from the overlying surface; but these are matters which would have to be taken into consideration in estimating the value of the easement.

Nor is it true, as contended, that the appropriation of the surface of the oil-bearing land of itself necessarily destroys all right of defendants in the oil underneath it, by reason of such appropriation. As we have indicated above, this does not follow if, as a fact, by virtue of owning adjoining lands, a reserved ownership in the oils beneath the surface easement is of value. Not only this, but there are certain legal rights which, while

Southern Pac. R. Co. v. San Francisco Sav. Union

enforceable by any owner of the surface of oil-bearing lands, are equally secured to the defendants in protection of their reserved rights to the oils underlying the easement, notwithstanding the surface control has been taken from them. By the condemnation proceedings, the plaintiff could not get any interest in the land itself, but only a right of way across it. It acquired no right to the underlying oils. If it should abstract them from under this right of way, the defendants could recover their value in an action for damages for their conversion, or could maintain an action in claim and delivery for their possession, to the same extent as against any other trespasser (*Hail v. Reed*, 15 B. Mon. [Ky.] 479; *Hughes v. U. P. Lines*, 119 N. Y. 426, 23 N. E. 1042); or, if the plaintiff should attempt to sink wells on the right of way, it could be restrained in equity at the instance of defendants, on the ground of a threatened irreparable injury. As is said in *Bettman v. Harness*, 42 W. Va. 437, 26 S. E. 272, 36 L. R. A. 566: "Such damages subtract from the very substance of the estate and tend to its ultimate destruction. * * * Petroleum oil in place is a part of the realty, and its unlawful removal a disherison equity will enjoin." The interest reserved to the owner in the fee owning adjoining land, upon condemnation of a right of way, is in all respects the same as if he had made a grant or a lease of a portion of the surface of his oil-bearing land, reserving to himself, as the owner of adjoining land, the right to all minerals beneath the granted or leased tract, but without right to enter upon its surface to sink wells. Such a right has been held to be a valuable one as to petroleum oil, notwithstanding its fugitive and wandering nature, and an attempted invasion of such right enjoined. *Westmoreland & C. N. G. Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. It is true that, in making a grant or lease with such a reservation in favor of his retained land, the grantor or lessor acts upon his own volition, and the value of the reservation depends upon his judgment, which may be influenced by the location of the different tracts and the area of granted and reserved lands and other considerations. But, although the proceeding in condemnation is in invitum, these same matters can be taken into consideration in determining whether the reservation which the law makes in these minerals is of substantial benefit to the owner of the adjoining land. If this reservation is of no benefit, then, as a matter of course, the condemning party must pay for the easement whatever the value of the fee is ascertained to be. If, however, there is a beneficial ownership in the oils underlying the right of way, as these are reserved to the owner of the fee, the value of this beneficial ownership must be taken into consideration as something separate and apart from the value of the easement, and the value of the easement alone assessed against the condemning party. As in condemnation proceedings only an easement is acquired, this is all that the law requires shall be paid for. We discover no reason why the rule pertaining to the de-

Southern Pac. R. Co. v. San Francisco Sav. Union

termination of the value of an easement, which is adopted with reference to mineral lands, where the minerals are in situ, should not be applied to easements over oil-bearing lands. In principle there is no distinction, though as to oil lands the practical application of the rule may be more difficult. It no doubt will always be more difficult to prove whether a reserved right in oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said to be impossible to do it. It can hardly be that, in every case where a right of way is sought to be condemned over a strip of oil-bearing land, the valuable rights which were owned by the defendant when the condemnation proceedings were inaugurated, and which the condemning party does not acquire, are entirely lost to the defendant owning adjoining land by reason of the condemnation.

This disposes of the main point in the case, but appellant presents two other questions relative to rulings of the court. It insists that the trial court should have granted its motion to strike out the testimony of the witness Rusk, called on behalf of defendant, as to the market value of the property in question, on the ground that it appeared from his cross-examination that his testimony in that respect was merely conjectural and speculative. We do not think so. The witness fully qualified himself on direct examination to give an opinion on the subject. On cross-examination he testified as to the matters which would influence him from the standpoint of a contemplating buyer in determining the market value of land in an oil-bearing territory; the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom; and the general relation of outlay to income. On cross-examination he entered into no details, nor gave any estimates. These were matters which, it appears to us, would naturally be taken into calculation in forming a public and general estimate of the value of land of this character, and which would influence the minds of sellers and buyers with relation to it, and to which the witness could properly testify. It is true the witness, in addition, testified that he would take into consideration what "he could pay for it and have sufficient margin for speculation during at least five years," which, of course, is not a factor in determining market value; and, if the motion to strike out had been addressed to this particular testimony, it would, doubtless, have been granted. It afforded, however, no warrant for striking out all the testimony of the witness, and the motion was properly denied.

It is further claimed that the lower court erred in refusing to allow appellant to prove a progressive decrease in the productiveness of the oil field within which the land in question is situated. Upon the argument here, counsel for respondents do not discuss the right of the appellant to make such proof, but defend the ruling of the court on the ground that the question, as addressed to the particular witness, was too indefinite and vague. This was probably true. Upon a new trial, however, objection on that

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the motion for a new trial is reversed, and

McFARLAND, J.; HENSHAW, J.

LORAIN STEEL CO. v. NORFOLK & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Norfolk, March 3, 1905.)

[73 N. E. Rep. 646.]

Conditional Sales—Failure to Pay Price—Remedy of Seller.—Where property is sold to remain the property of the seller until payment made, and this condition is not complied with, the seller may maintain replevin or trover to recover the property even from a purchaser for value and without notice.

Same—Rails for Street Railway—Effect of Laying Rails in Track on Rights of Seller.—Where rails were sold to a street railway company by a contract providing that they should remain the property of the seller until paid for, the laying of the rails in a track on land in which the company owned no interest did not render them part of the realty, so as to prevent the seller from recovering them.

Same—Rolling Stock—Recordation—Application of Statute.—St. 1894, p. 355, c. 326, providing that a conditional sale of street railway rolling stock shall not be valid against a purchaser in good faith and without knowledge, unless shown by a written and recorded instrument, and requiring each car sold by conditional sale to be plainly marked on each side with the name of the seller, followed by the word "owner," applies to completed cars, and does not require a conditional sale of trucks, motors, and motor equipments to be recorded.

Same—Mortgage—Consent of Seller.—Consent by the seller in a conditional sale that the property be mortgaged to a certain corporation, does not authorize its mortgage to another corporation.

Conversion.—Where plaintiff demanded property of defendant, and defendant denied possession of any property belonging to plaintiff, and also stated that, if it had any of the articles, it would refuse to deliver them, there was a sufficient denial of plaintiff's title and exclusion from possession to support conversion.

Conditional Sales—Portion of Price Unpaid—Recovery of Value.—Where property is sold on condition that title shall not pass until the price is paid in full, and this condition is not complied with, the fact that the portion of the price remaining unpaid is less than the market value of the property does not preclude the seller from recovering the value of the property from a purchaser thereof.

Same—Same—Same.—Where the seller in a conditional sale sues in conversion to recover the value of the property from a second purchaser because a portion of the price has not been paid, neither the first nor the second purchaser has a right to recover the part which has been paid, and evidence of such a claim is inadmissible either by way of mitigation of damages or to avoid circuitry of action.

Lorain Steel Co. v. Norfolk & B. St. Ry. Co

Measure of Recovery.—In trover plaintiff is entitled to the market value of the property converted, with interest from the time of the conversion to the date of the verdict or finding.

Report from Superior Court, Norfolk County; Edwd. P. Pierce, Judge.

Action by the Lorain Steel Company against the Norfolk & Bristol Street Railway Company. Judgment was entered for plaintiff for \$1,000, and the cause reported to the Supreme Judicial Court. Judgment for plaintiff.

Jas. A. Stiles, for plaintiff.

Gaston, Snow & Saltonstall, for defendant.

BRALEY, J. Whatever title the plaintiff has to the property described in the declaration is derived under a written agreement made by the Johnson Company with the Norfolk Southern Street Railway Company to furnish and equip the street railway now owned and operated by the defendant with rails, trucks, motors, and motor equipments. It was expressly provided by the contract that the materials made or supplied for this purpose should remain the property of the vendor until payment therefor had been fully made. This condition has not been complied with, and, unless its performance has been waived, or the defendant has acquired a paramount title, the vendor, and hence the plaintiff, to whose rights it has succeeded, could maintain replevin to recover the rails and other articles delivered, or tort in the nature of trover for their conversion, even if the mortgagee, under whom the defendant claims, is found to be a purchaser for value, and without notice. *Coggill v. Hartford & New Haven Railroad*, 3 Gray, 545, 547; *Deshon v. Bigelow*, 8 Gray, 159; *Amour v. Pecker*, 123 Mass. 143, 145; *Wentworth v. Woods Machine Co.*, 163 Mass. 28, 39 N. E. 414; *Cottrell & Sons Co. v. Carter Rice & Co.*, 173 Mass. 155, 159, 53 N. E. 375, and cases cited; *Oliver Ditson Co. v. Bates*, 181 Mass. 455, 63 N. E. 908, 57 L. R. A. 289, 92 Am. St. Rep. 424. When the contract was entered into, and the rails delivered, it was understood that they were to be used in the construction of a track for the railway company, and an assent to such use by the vendor is implied from the very nature of the undertaking. The track was built in the ordinary way by spiking the rails to sleepers laid within the location in the public ways granted to the company, and the defendant claims that such an annexation to the soil changed them from personalty to realty, and that an action will not lie for their conversion, as the plaintiff concedes that the American Loan & Trust Company, mortgagee in the mortgage under the foreclosure of which the defendant claims its title, was ignorant of the conditional agreement. In support of this contention it relies upon the settled rule that rails affixed in the usual manner to the roadbed of a railroad, if there is no agreement to the contrary, become part of the realty; and where

Lorain Steel Co. v. Norfolk & B. St. Ry. Co

there is such an agreement, while the rails as between the seller and the railroad are personalty, if the roadbed is mortgaged to a mortgagee who has no notice of the agreement, and a foreclosure follows, the purchaser at the sale acquires a good title against the vendor. *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819. There is, however, a clear distinction between the nature of a right of way acquired by a railroad and the ordinary grant of a location in the public ways to a street railway. When not obtained by purchase, a railroad corporation lays its rails on land in which a right in the nature of a permanent easement has been taken by the exercise of the delegated power of eminent domain, and thus an interest in real estate is acquired. *Barnes v. Boston & Maine R. R.*, 130 Mass. 388. Within the limits of the layout it has the exclusive use and control of its roadway for all purposes authorized by its charter, whether by a special act of incorporation or under the general laws, subject only to such transitory invasions as may be required by a public emergency. *Locks & Canals v. Nashua & Lowell R. R.*, 104 Mass. 1, 6 Am. Rep. 181; *Sweeney v. Boston & Maine R. R.*, 128 Mass. 5, 6; *Peirce v. Boston & Lowell R. R.*, 141 Mass. 481, 486, 6 N. E. 96. And among the uses to which the location can lawfully be put are not only the construction and maintenance of the roadbed for the running of trains, but also of buildings necessary for carrying on the business of a common carrier as ordinarily conducted. *Peirce v. Boston & Maine R. R.*, *supra*. The interest in land thus acquired and held takes on all the characteristics of an estate in fee, with the single exception that, where the taking is of an easement alone, when the use ceases the easement is at an end, and for this reason the general rule of the common law that what is annexed to the freehold by the owner becomes a part of the realty and passes by his deed is held applicable to conveyances made by a railroad of its right of way, roadbed, and track. *Butler v. Page*, 7 Metc. 40, 39 Am. Dec. 757; *Hunt v. Bay State Iron Co.*, *supra*.

But a street railway gains no easement or freehold interest in the soil, or exclusive control of the highways in which a location is granted to lay tracks and operate the road. The right conferred is to use the way within its location in common with others, and not exclusively for its own benefit. The whole way is as fully open to the lawful use of travelers after the road is built and in operation as before. *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261; *Atty. Gen. v. Metropolitan Ry.*, 125 Mass. 515, 517, 28 Am. Rep. 264; *O'Brien v. Blue Hill St. Ry. Co.*, 186 Mass. 446, 71 N. E. 951. The use of a public way by a street railway is on the same footing as its use by other quasi public corporations for the laying of gas and water pipes or the erection of poles and wires for the use of telegraph, telephone, and electric light companies—that are all recognized as agencies for the larger accommodation of the public, under whose rights they

Lorain Steel Co. v. Norfolk & B. St. Ry. Co

are allowed to come in and participate in the enjoyment of an easement, payment for which has already been made. *N. E. Telephone & Telegraph Co. v. Boston Terminal Co.*, 182 Mass. 397, 399, 65 N. E. 835, and cases cited. It has consequently been held that gas and water pipes, manholes, conduits, wires and poles used for the transmission of intelligence or supplying light by electricity, laid, placed, or erected and maintained in public streets, are personal property, which the owner may remove; but, if not removed, and the street is appropriated for another public use, which requires their removal, as no interest in land is taken, the owner is not entitled to damages. *Com. v. Lowell Gas Light Co.*, 12 Allen, 75; *Natick Gas Light Co. v. Natick*, 175 Mass. 246, 248, 56 N. E. 292; *Dudley v. Jamaica Pond Aqueduct Corporation*, 100 Mass. 183; *New England Telephone & Telegraph Co. v. Boston Terminal Co.*, supra; *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566, 69 N. E. 346. The Norfolk Southern Street Railway had no authority to exercise the right of eminent domain; nor could it acquire title by purchase from the municipalities, as they were not authorized to sell or convey such an interest in the public ways; and the grant of a location only conferred a particular right under certain conditions to use a public easement in common with the public. It therefore gained no interest in the soil of the streets through which its tracks was laid. *Attorney General v. Metropolitan Railroad Co.*, supra. See, also, *Springfield v. Springfield Street Railway Co.*, 182 Mass. 41, 47, 48, 64 N. E. 577. The case of *Clemens Electrical Mfg. Co. v. Walton*, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820, on which the defendant relies as sustaining a different view, is not an authority in its favor, for it is expressly said in the opinion that it was not necessary to decide whether the rails became realty, and followed the soil, or remained personal property. By the laying of the rails as a part of the defendant's track they did not lose their character of personalty, and become realty, by the fact of annexation, because the defendant's predecessor had no land, or interest in land, of which they could form a part.

The conditional sale also included, and the plaintiff seeks to recover for the conversion of, the trucks, motors, and motor equipments. But the defendant urgently insists that under St. 1894, p. 355, c. 326, they must be classed as "street railway rolling stock," a conditional sale of which is not valid against a purchaser in good faith, and without notice, unless shown by a written instrument duly acknowledged and recorded in the office of the Secretary of the Commonwealth. If the language employed is given its ordinary meaning, the rolling stock of street railways means cars fully equipped for the transportation of passengers or of freight, so far as they are permitted to transport merchandise. The requirement that each car held by such a title shall be plainly marked on each side with the name of the vendor, followed by the word "owner," applies to the completed

Osgood v. Central Vermont R. Co

gence. This may with equal truth be said of the case at bar. It is not like the *Tarbell Case*, 73 Vt. 347, 51 Atl. 6, 56 L. R. A. 656, 87 Am. St. Rep. 734, for there the negligence stipulated against touched the interest of the public, as the public has an interest in the personal safety of railroad operatives. In the very recent case of *Mann v. Pere Marquette R. Co.*, decided by the Supreme Court of Michigan, and found in 97 N. W. 721, the plaintiffs were lumbermen, and owned a large mill. Desiring to have side tracks laid thereto for shipping in and out products, they applied to the defendant to put them in, and thereupon a contract was entered into whereby the company agreed to build the tracks, and the plaintiffs, recognizing that the use of them involved risk of loss by fire from engines, assumed, as a further inducement and consideration for their construction, all such risk of fire, and released the company from all liability, statutory or otherwise, for loss or injury to them by fire, whether due to the negligence of the company or its employees or otherwise. The court said that the case did not fall within those where contracts to exempt from liability are held void on the ground of public policy; that it is a fundamental rule that what one may refuse to do entirely, he may agree to do upon such terms as he pleases; that the defendant was not acting as a public carrier, and was not bound to put in the tracks; that there was no occasion to contract against property equipped and properly managed engines, for fire caused by such would not impose liability; and that the only purpose of such a contract was to avoid the consequences of the defendant's own negligence, which it had a perfect right to contract against, both in reason and on authority. These cases are not so strong as the one at bar, for the fires there stipulated against might have spread and endangered the public, while the cause of the injury here involved necessarily spent itself with the injury.

As the promise is divisible, we have no occasion to consider whether the rest of it is against public policy or in contravention of either of said sections, the last of which provides that those owning or operating a railroad shall be responsible in damages for injuries by fire communicated by engines, unless due caution and diligence are used, and suitable expedients employed, to prevent such damage. We hold, therefore, that that portion of the contract applicable to the injury in question is not against public policy or in contravention of said sections, but is good and enforceable against the plaintiff.

Judgment reversed, and judgment for the defendant to recover its costs.

VILLAGE OF PLYMOUTH *v.* PERE MARQUETTE R. CO.

(Supreme Court of Michigan, March 21, 1905.)

[102 N. W. Rep. 947.]

Highways—Railroad Crossings—Condemnation—Damages—Elements—Police Regulations—Compliance—Opening Trains.*—In proceedings to condemn a highway across a railroad's right of way the railroad, though entitled to compensation for necessary structural changes, and for any direct expense incurred, is not entitled to compensation for the observance of public regulations requiring railroads to open trains at crossings to admit of teams passing over its tracks if such trains occupy the street longer than a specified time.

Appeal from Circuit Court, Wayne County; George S. Hosmer, Judge.

Proceedings by the village of Plymouth against the Pere Marquette Railroad Company to condemn a right of way for a street across defendant's track. From a judgment awarding defendant a certain sum for damages, it appeals. Affirmed.

Argued before MOORE, C. J., and CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ.

Paul W. Voorhies (*Harry Helfman*, of counsel), for petitioner.

Frederick W. Stevens (*Charles McPherson*, of counsel), for respondent.

MONTGOMERY, J. This is a review of a proceeding taken by the petitioner to condemn a right of way for a street across the defendant's track. The jury determined that the opening of the street was a necessary public improvement, and awarded the respondent damages to the amount of \$382.64. The respondent brings the case here for review, contending that the circuit judge erred in his instructions to the jury as to the proper items to be considered in awarding damages.

It appears that at the point where the proposed street crosses the respondent's tracks there are three tracks. The center track is the main track for trains between Toledo and Saginaw. The east track curves to the right, and connects the main track to Toledo with the main track to Detroit. The west track is known as the "south lead track," and extends to the yard and the engine house. The testimony tended to show that the south lead track and the Detroit "Y" are used for storing through trains while the locomotives are being supplied with coal and water and while the trainmen are waiting orders to proceed, and that upon the opening of this street, if the present method of operating trains continues, it will be necessary to open certain of defendant's trains in order to avoid an obstruction of the new street for more

*See note appended to *Chicago, etc., Ry. Co. v. Milwaukee* (Wis.), 9 Am. & Eng. R. Cas., N. S., 537.

Williams & Pearson v. Dittenhoefer

L. F. Parker, Jas. Orchard, and E. H. Seneff, for appellants.
E. R. Lentz, for respondents.

LAMM, J. The Southern Missouri & Arkansas Railroad Company is a domestic railroad corporation, and in 1901 built a railroad from the city of Cape Girardeau through the county of the same name, as well as the counties of Bollinger, Stoddard, Wayne, Butler, and Ripley, to the line between Missouri and Arkansas, and thence into Arkansas. It let a contract for the construction of its roadbed, etc., to Irving M. Dittenhoefer, who, in turn, contracted a portion of the work to Killebrew & Co., a firm, and they, in turn, contracted with respondents, who performed. A dispute arising over the classification and payment for material in embankments as "earth," which it was contended should have been classified and paid for as "loose rock," respondents, within 90 days after completing their work, filed an alleged just and true account of the amount due them, after all just credits had been given (stating the facts alleged to be necessary to constitute a lien under article 4, chapter 47, Rev. St. 1899), in the office of the clerk of the circuit court of Butler county, and within due time sued to enforce their statutory lien. Dittenhoefer was made a party, but, failing in service, the cause was dismissed as to him. Killebrew & Co. were not sued. After the completion of the work and the filing of the "lien paper," the Southern Missouri & Arkansas Railroad Company sold out to its co-appellant, the St. Louis, Memphis & Southeastern Railroad Company, and both said corporations were made parties defendant in the suit. At a trial, with the aid of a jury, a judgment resulted, establishing the indebtedness of Killebrew & Co. to respondents at \$16,512.97, and a lien for said sum was foreclosed on the railroad formerly known as the Southern Missouri & Arkansas Railroad, and now known as the St. Louis, Memphis & Southeastern Railroad, including its roadbed, station houses, depots, bridges, rolling stock, real estate, and improvements, and a special fi. fa. ordered issued. From this judgment the two corporate defendants duly appealed.

It should be said at the threshold that the assignment of errors, both in quantity and quality, reflect credit on the versatility of counsel, but such errors need not be considered in blanket form or in severalty, for the following reasons: The turning point in the case, in our opinion, relates to the notice of the lien or account, and since the real debtors, against whom a judgment in personam might go, are not parties to the record, it results that the proceedings is essentially one in rem, and that any judicial discussion of the points not necessary to the decision of the question of notice would rise to the mark of mere obiter, and no higher. Eliminating, then, as a work of supererogation, any detailed statement of the exhaustive pleadings, instructions, and the other points directed to the paper and trial issues, let the following statement of the crucial question suffice: In their petition, as was necessary, respondents averred "that they did, within

Williams & Pearson v. Dittenhoefer

the said ninety days from the completion of said work, serve upon the Southern Missouri & Arkansas Railroad Company—it having charge and control of said railroad—a true copy of said account, as required by section 4241 of said Revised Statutes of 1899.” This allegation, among others, was denied in the answer, and respondents held the laboring oar on the proof. The record preserves the following on the proof of notice: “Mr. Lentz: I now desire to offer in evidence the receipt of H. E. Johnson, station agent of the Southern Missouri & Arkansas Railway Company at Poplar Bluff, Missouri, indorsed on the back of a copy of the lien statement which has been read in evidence. Mr. Burrough: We object to a service on the agent of that character of a paper. The Court: I will reserve my ruling on that for the present. Mr. Burrough: We except. ‘Received a copy of within this 27th day of Nov. 1901. H. E. Johnson, Station Agent of Southern Missouri and Arkansas Railroad Company.’” It has not been pointed out to us, nor have we been able to put our finger on the place in the record where a more specific ruling was made by the court nisi, than above indicated; but as the ruling, such as it was, resulted in the introduction of the proof of service in evidence, and as there was no other proof of service of notice, and as proof in some form was imperative, we will treat the interlocutory ruling as final, precisely as counsel on both sides have done in briefs. At the close of the case, appellants asked and were refused a peremptory instruction, and saved their exception. Did the court commit reversible error in its disposition of the proof of service, and err again on that behalf in refusing the peremptory instruction?

1. A secondary contention is discussed by counsel, which may be stated thus: Appellants assert there is no proof that H. E. Johnson was at the time station agent of the Southern Missouri & Arkansas Railroad Company. To this respondent’s counsel replies—and we think conclusively—that no such point was made below. Appellants contented themselves below with one specific objection, and that one did not cover or relate to the fact that there was no proof of Johnson’s agency. To the contrary, the objection made assumed the existence of the agency and the scope of the agency, to wit, the duties of station agent for appellant; and, such being the case, no violence will be done to the practical administration of the law by confining appellants to the bed they made for themselves to lie in. The trial court was entitled to know the grounds of the objection. In obedience to that rule of practice, appellants stated their ground to be, in effect, that such notice could not be served on a station agent. This objection proved ineffective. Had the additional objection been made that there was no evidence that Johnson was in fact station agent, doubtless it would have been sustained, and the proof at once supplied. To make one objection below for the trial court to pass on, and then veer about and make another and a different objection on review, would be to treat the trial court

Williams & Pearson v. Dittenhoefer

unfairly and make a palpable pitfall and snare of the law. The versatile arts of the prestidigitator may give a glow of zest to moments of relaxation or ennui, but have no conventional place in the serious affairs of justice, and must be disallowed in matters of gravity.

2. The compelling question raised by the objection is whether, assuming Johnson's agency, and conceding the scope of his agency to be that of station agent, service of a copy of the "lien paper" or account on Johnson, as station agent, was service on appellant corporation, the Southern Missouri & Arkansas Railroad Company, as contemplated by law. Respondents' counsel insist the paper was left at the business office of the corporation in Poplar Bluff, with the agent in charge. In the view we take of the matter, this insistence is not decisive of the case, were it maintainable. But is it maintainable even by inference? We think not. The receipt is the silent and only testimony. In it Johnson describes himself as "station agent" of appellant. By inference the conclusion may be drawn that on the 27th of November, 1901, appellant had a "station," which Johnson had charge of as agent; but, read however blandly, it cannot be made to say that the station was at Poplar Bluff, nor does it set forth aught relating to where the paper was left, or that it was left at any business office of appellant at Poplar Bluff or anywhere else. The pertinent part of the statute providing for notice is as follows: "Sec. 4241. * * * It shall be the duty of all persons claiming the benefit of such lien, within ninety days next after the completion of the work, or after the materials are furnished, to file in the office of the circuit clerk of any county through which said railroad is located, a just and true account of the amount due after all just credits have been given, which account shall state * * *; and it shall be the duty of all persons claiming such lien, within said ninety days, to serve a copy of the above account on the person or corporation owning or operating or having charge of said road or of the property to which said lien attaches." It is said the object to be subserved by this notice and similar notices is to put the owner on his guard, and protect him against payments to the contractors in privity with him while outstanding claims of workmen, subcontractors, and materialmen exist, to the end that, if possible, he may retain from the original contractor enough of the contract price to indemnify him against loss. *Henry v. Plitt*, 84 Mo., loc. cit. 240; *Henry et al. v. Evans*, 97 Mo., loc. cit. 55, 56, 10 S. W. 868, 3 L. R. A. 332; *Morgan v. R. R.*, 76 Mo., loc. cit. 172. The scope and character of the notice, to wit, a copy of the true account, indicate a further intention of the lawmakers to arm the owner with all data necessary to an intelligent understanding of accounts existing between others, and which threaten his property, to the end that a settlement may be made without the cost and embarrassment of litigation, if he so elect. The lien is wholly a creature of the statute, and the service of this notice is a condi-

Williams & Pearson v. Dittenhoefer

tion precedent to the right of a subcontractor to sue to enforce it; but the statute nowhere points out how or on whom this service may be made, other than the general direction that it shall be served on "the person or corporation owning," etc. When service of notice is required by a statute, and no manner is prescribed, personal service is meant. 21 Am. & Eng. Ency. (2d Ed.) 583; *Ryan v. Kelly*, 9 Mo. App. 396; *Sedalia v. Gallie*, 49 Mo. App. 392; *Allen v. Mfg. Co.*, 72 Mo., loc. cit. 328; *Lounsbury v. R. R.*, 49 Iowa, 255; *Cosgrove v. R. R.*, 54 Mo., loc. cit. 499; *Haldane v. U. S.*, 69 Fed. 819, 16 C. C. A. 447. As corporate bodies have no hands, feet, or heads but their officers and agents, and as they live, move, act, and think through such officers and agents, the governing body or president of the corporation, or the chief managing agent for that time, in the eye of the law, becomes the corporation itself, for the purpose of personal service, if such officer, governing body, or agent of that rank can be got at. Notice to an agent of a corporation is, by a fiction of the law, held to be notice to the corporation itself of matters within the scope of his agency, and not otherwise. Such is the general doctrine of standard text-writers. Story on Agency (9th Ed.) §§ 140, 140a; Angel & Ames on Corporations (11th Ed.) § 305; 1 Morawetz on Corp. (2d Ed.) §§ 540b, 540c. And this general principle runs through all the cases, like the marking red thread runs through the cordage of the British navy. In the case of a foreign railroad corporation it has been held that service of the notice or copy of the account contemplated by section 4241, *supra*, may be made on a station agent. *Morgan v. R. R.*, 76 Mo. 161. Some of the language used by Ray, J., in the *Morgan Case*, may seem at first blush broad enough to include domestic corporations within the rationale of the case, if it were permissible to apply the language mechanically and without discrimination; but it may be observed that a majority of the court did not fully adopt all that was said *arguendo* in that case, since Sherwood, Henry, and Hough, JJ., base their concurrence on the state of the pleadings alone, and agree only in the result reached. At all events, the reasoning of the *Morgan Case* is not applicable to the case at bar. In two later cases the question of service of statutory lien notices on a domestic corporation came before this court. *Heltzell v. R. R.*, 77 Mo. 315, and *Id. v. R. R.*, 77 Mo. 482. In the first of these cases it was said: "It is provided by law how and upon whom all writs of summons and all notices, orders, and rules in the progress of any cause, directed to a corporation, shall be served; but there is no statute of this state prescribing upon what officer or officers of a domestic corporation notices shall be served which are required by law to be served before the institution of a suit in order to fix a lien or give a right of action. In the absence of any legislative enactment providing how such notices shall be served, it would seem reasonable to hold, when service cannot be had on the chief officer or managing agent of the cor-

Williams & Pearson v. Dittenhoefer

poration, service on any officer whose official relation to the governing body or managing agent or chief officer of the corporation would make it his duty to communicate such notice to such body, agent, or officer will be sufficient." In that case it was held that the following return as proof of service was good: "Served this notice in the city of St. Louis on the 5th day of October, 1878, by delivering a copy thereof to R. P. Tansey, secretary of the Kansas City, St. Louis & Chicago Railroad Company, the president thereof being absent from the city and could not be found. [Signed] John Finn, Sheriff City of St. Louis." So that the case amounts to an adjudication that a secretary is a proper officer, in the absence of the president or managing agent, on whom service may be had of a notice of the lien, and amounts, furthermore, to an authoritative suggestion that any other corporate officer or agent whose duties are of such dignity, intimate connection, and bond of union with the president or managing agent of the corporation, or governing body of the corporation, as to make it his duty to communicate such notice to them or either of them, would be a proper officer to make service upon in the absence of such chief officer or managing agent. The other case (77 Mo. 482) simply holds that a stranger to defendant corporation, who had deskroom in the office of the company, was not a proper party on whom service could be made, and throws no light on the precise matter now under consideration. Looking at the general policy of our laws, as indicated by living, cognate enactments, it will be seen that no other conclusion can be reached than that announced in the Heltzell Case, *supra*; e. g., by section 998, Rev. St. 1899, provision is made for serving notices, orders, and rules in the progress of any cause on domestic corporations, and it is directed that they be served in like manner as in other civil cases. In other civil cases they are served upon the opposite party or his attorney. Sections 586, 716, 822, Rev. St. 1899. It is true that "writs of summons," by virtue of express statute, may be served on domestic corporations by making service on the "president or other chief officer or in his absence by leaving a copy thereof at any business office of said company with the person having charge thereof," etc. Section 995, Rev. St. 1899. A station agent, other conditions present, becomes *pro hac vice* in that instance an agent on whom service of that character of writ may be made; but, in the absence of express enactment providing for service of a notice of lien on the corporation by giving it to a mere station agent, it cannot be held that such service is good, for the duties of a station agent *per se* do not bring him within the reason of the rule announced in Heltzell v. R. R., *supra*. To this condition of things the maxim, "*Cessante ratione, cessat et ipsa lex*," applies. The courts recognize a distinction between service of summons, which by virtue of the peculiar terms of statute law may be made indirectly or constructively on a person by leaving it with a member of the family over 15 years of age (section 570, Rev. St.), or on a domestic

Illinois Cent. R. Co. v. Stith's Adm'x

corporation in accordance with the terms and under the provisions of section 995, supra, and the service of a lien notice prior to suit, under the mechanic's lien law. In the latter case, indirect service will not do. *Ryan v. Kelly*, 9 Mo. App. 396, supra; *Meyer v. Christian*, 64 Mo. App. 203. And we are of opinion the service of notice is bad in this case, both on reason and authority.

No hardship results from this construction, for every domestic railroad corporation, under a heavy penalty, must have a general office within this state located on or near the line of its road. Sections 1022, 1023, Rev. St. 1899. At such general office must be kept the offices of the superintendent, general manager, or director, traffic manager, auditor, treasurer, paymaster, general freight agent, and general ticket and passenger agent, under whatever name the duties usually pertaining to such offices may be transacted. No suggestion is made here that such easily accessible general office did not exist. The presumption is it did exist, and that a chief or managing corporate officer, or some officer or agent of the corporation whose corporate and official duty it was to communicate such notice to the chief or managing officer or governing body, existed and was accessible. Suggestion is made, dehors the record, that the president of appellant resided in New York, but this suggestion cannot be considered; and, if the fact were as suggested, it throws no obstacle in the way of proper service on some other corporate officer, meeting the spirit and obvious intent of the law.

Respondents lost their lien. Their rights, if any, must be established against those with whom they contracted. Appellants' objection to the admission of Johnson's receipt of the copy of the lien account should have been sustained and their peremptory instruction should have been given.

The cause is reversed. All concur, except BRACE, P. J., who is absent.

ILLINOIS CENT. R. Co. et al. v. STITH'S ADM'X.

(Court of Appeals of Kentucky, March 25, 1905.)

[85 S. W. Rep. 1173.]

Wrongful Death—Venue.—Under Ky. St. 1903, § 6, providing that an action for death shall be prosecuted by deceased's personal representative, and Civ. Code Prac. § 73, providing that an action against a carrier for personal injury must be brought in the county in which defendant resides or plaintiff was injured, or plaintiff resides, if he resided in a county into which the carrier passes, the county of plaintiff's residence, in an action for death, is the county in which the personal representative lives.

Injury to Engineer—Contributory Negligence—Rules.*—Though an

*As to contributory negligence and assumption of risk where employees fail to comply with rules and instructions, see foot-note appended to *McMillan v. Grand Trunk Ry. Co.* (C. C. A.), 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712; foot-note appended to *Carson v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337.

Illinois Cent. R. Co. v. Stith's Adm'r

engineer, in violation of rules, took his engine, for necessary water, onto the main track on the time of a passenger train, which ran into him, he was not guilty of contributory negligence; he having taken the steps prescribed by the rules for giving notice of his presence, by sending out a flagman with a torpedo and turning the switch light.

Air Brakes—Tests—Evidence.—Professed tests of air brakes appearing in the back of a book of instructions, which are but advertisements of the makers, are not admissible, in an action against a railroad for negligence, as evidence of the distance required for stopping a train with the brakes.

Appeal from Circuit Court, Hardin County.

Action by Robert H. Stith's administratrix against the Illinois Central Railroad Company and another. Judgment for plaintiff. Defendants appeal. Reversed.

Poston & Moorman, Pirtle, Trabue, Doolan & Cox, and *J. M. Dickinson*, for appellants.

L. A. Faurest, for appellee.

NUNN, J. The appellee's intestate was an engineer on a work train of appellant, and was killed on December 27, 1902, at Caneyville, Grayson county, Ky. The decedent at the time of his death was a resident of Louisville, Jefferson county, Ky., where the appellee qualified as the administratrix of his estate. She, as such administratrix, instituted this action in the Hardin circuit court, and, in substance, alleged in the petition that appellants, Illinois Central Railroad Company and one Louis Cofer, an engineer in the employ of the railroad company, by gross negligence ran its engine and train of cars on its railroad, upon which Cofer was acting as engineer, with great force and violence, against the engine in charge of her intestate, and upon which he was at the time, and against the cars attached thereto, and against her intestate, and did thereby kill him, to appellee's damage in the sum of \$20,000. The appellant first filed a plea to the jurisdiction of the Hardin circuit court, stating that the accident occurred in Grayson county, Ky.; that Stith, at the time he was killed, was a citizen and resident of Jefferson county, Ky.; that appellee qualified as his administratrix in Jefferson county, Ky., and that she resided in Jefferson county at the time of filing this suit, and still resided there; that appellant had its chief officer and offices which it had in Kentucky in Jefferson county at the time of filing this suit and ever since; that its co-appellant, Louis Cofer, did not reside in Hardin county at the time of the happening of the things complained of in the petition, and did not then reside in Hardin county. Upon these facts, it asked for a dismissal of the action because the Hardin circuit court did not have jurisdiction. The appellant, by answer and amended answers, traversed all the material allegations of negligence contained in the petition, and set up the separate defense of contributory negligence on the part of Stith, and also set out certain rules of the company for the government of its employees, and averred that Stith's position

Illinois Cent. R. Co. v. Stith's Adm'r

on the track at the time he was killed was taken in violation of these rules. It appears that the reply of appellee was lost from the record, and, in order to avoid delay and expense, it was agreed that all pleadings should stand as if all affirmative matter in them had been controverted of record, and as if all affirmative pleas that could have been made had been made thereto, and the affirmative pleas controverted of record. Thus the issues were fairly made up as to the place of residence of appellee at the institution of the action and down to the time of trial, and as to negligence, contributory negligence, and the violation of rules governing the service of decedent and other employees of the appellant company. Upon these issues there was a trial, and a verdict and judgment for appellee for \$5,000 against both of the appellants. Their motion for a new trial having been overruled, they have appealed.

The first ground urged for a reversal is that the lower court had no jurisdiction of the action. It appears from the record that at the time of Robert Stith's death he was a resident of Jefferson county, Ky., and appellee was appointed administratrix of his estate by the county court of that county. The injuries causing his death were inflicted in Grayson county. But at the time of the institution of this action the appellee was a resident of Hardin county, and the action was brought in that county and appellant's line of railroad passed through that county. These facts are virtually conceded by both sides. Appellants contend that the personal residence of the appellee in Hardin county did not confer jurisdiction upon the circuit court of that county to try the action. Section 73 of the Civil Code provides: "An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he resided in a county into which the carrier passes." This section fixes three localities where such an action may be brought, namely, the county of defendant's residence, the county where the injury was done, and the county of the plaintiff's residence, if the carrier passes into that county. Manifestly, the personal representative is the only plaintiff in this action, and the only person who could have brought it, for by section 6 of the Kentucky Statutes of 1903 it is provided that the action to recover such damages shall be prosecuted by the personal representative of the deceased. Therefore, according to the letter of the statute, the residence of the personal representative is one of the places where the action may be brought. When the General Assembly enacted section 73 of the Code, it evidently had the convenience of all parties in mind. Therefore it allowed the plaintiff to sue at the home of the defendant, if he so desired, or go to the county where the injury was inflicted, and where it would probably best suit the convenience of the witnesses, or to his own home county, provided the carrier passed through such county. The purpose

Illinois Cent. R. Co. v. Stith's Adm'r

of this last clause was to place the jurisdiction convenient to the plaintiff, and yet not inconvenient to the defendant. The fact that plaintiff resided there would make it convenient for him, and the fact that the defendant passed through the county would insure that it would not be unreasonably inconvenient to it. There is reason in this provision, if the home of the personal representative, in cases of death, is referred to, because he is the one who must look after and prosecute the suit; but it is absurd if the residence of the deceased is referred to, for his convenience can no longer be consulted. He can have no connection with the trial of the action. Therefore we are of the opinion that the spirit as well as the letter of the law requires the construction contended for by appellee to be placed on this section. See the case of *Turner's Adm'r v. L. & N. R. Co.*, 62 S. W. 1025, 23 Ky. Law Rep. 340; *L. & N. R. Co. v. Gilliam's Adm'r*, 71 S. W. 863, 24 Ky. Law. Rep. 1536, and *Sherrill v. Co.*, C. & S. W. R. Co., 89 Ky. 302, 12 S. W. 465.

The substance of the facts as they appear in the record is as follows: Appellee's intestate was employed by the appellant company in the capacity of engineer, and was placed in charge of the engine on one of its work trains. This train worked during the day at Rosine tunnel, and laid up at night at the town of Caneyville, where they had no yard master or yard hands. The crew of the work train consisted of the deceased; Eiffler, fireman; McCann, conductor; and Turner, flagman. At night a watchman named Bell was placed at the engine, but, under the rules of the company, he could not move it. The tank of this engine became leaky, and on the morning of December 27, 1902, before the usual time to arise, Stith, Eiffler, McCann, and Turner were all aroused at their boarding house by Bell, who informed them that the water had leaked out of the tank and was low in the engine, and that something had to be done at once. They all dressed and went to the engine. Stith went into the tank to repair the leak, and came out with dry feet. The engine had become hot for lack of water, and was getting hotter all the time. There was no night operator at Caneyville, and it was too early for the day operator. No. 104, a fast passenger train going north, was past due, but had been running from one-half hour to four hours late, and they had no means of knowing when that train would pass. They all considered the question whether they should flag No. 104, and take the engine out on the main track to a water tank near by, and take water, or whether they should draw the fire from the fire box and let the engine die. They realized that one of these things must be done at once, and concluded to flag No. 104 and take the engine out to the tank. Stith ordered Turner, the flagman, to proceed south and flag No. 104. Turner took his lantern and went to the curve south of Caneyville, 1,120 yards from the water tank, and, after Turner had reached this point, McCann threw the switch, and the engine was taken out on the main track to the water tank. McCann left the

Illinois Cent. R. Co. v. Stith's Adm'r

switch open, with the red light shining squarely down the track, and very soon thereafter No. 104 crashed into the work engine and killed Stith and Bell. The proof also shows that the distance from the water tank to the switch light, where the engine came upon the main track, was 215 yards, and the switch light was south of the tank, and the track continued straight south for 905 yards to the point where Flagman Turner was. The appellant Cofer testified that 104 was one of four fast trains which had the right of way, under the rules of the company, over all other trains on the road; that he was the engineer on 104 that morning, and was going north; that he did not see Turner at the point named by him, attempting to flag his train, nor did he notice that the switch was turned and the red light was against him until he was about 100 yards from it, nor did he discover decedent's engine and caboose on the main track until the headlight on his engine shone upon the caboose of the decedent's train; that he then immediately applied the emergency brakes, but could not stop his train, and the collision occurred with such force as to throw both engines from the track; that, when he first saw the red light of the switch, the thought occurred to him that the crew of some train leaving there had left it turned; that he could with his train pass over it without injury, as his train was going north, but the switch was so constructed that it would have been dangerous for a south-bound train to have attempted to pass it.

The appellants contend, under the facts as proven, that they were entitled to a peremptory instruction, for the reason that Stith took his train from the side track, a place of safety, and placed it at the water tank on the main track, in a place of danger, when he knew that 104 was due, and had not passed, and under the rules of the company it was entitled to the right of way, as against his work train. Appellee contends that her intestate was not guilty of any negligence; that he was confronted with an emergency which required prompt action to avert injury to the engine in his charge, which by the rules of the company he was required to protect, and also to avert loss of time to the train crew of hands at Rosine tunnel, which would have resulted if he had drawn the fire from the box and permitted the engine to die—and refers to rule 106 of the company which reads, "In all cases of doubt and uncertainty, the safe course must be taken and no risks run," and claims that, being confronted with this emergency, he exercised his best judgment, and it was for the jury to say whether he exercised this judgment properly under all the circumstances. We are of the opinion that appellee's intestate erred in taking his engine upon the track under the circumstances. He knew that 104 was entitled to the right of way, and by his going upon the main track with his engine he would probably impede the progress of this fast passenger train, which had important connections to make for the benefit of passengers, and might endanger the lives of the passengers and the company's employees and its property, which unfortunately did occur

Illinois Cent. R. Co. v. Stith's Adm'r

by reason of his mistake and violation of the rules. He should not have taken the risk, but should have taken the safe course and remained on the side track. But this being true, it does not necessarily follow that appellant was entitled to the peremptory instruction. The rules of the company, as shown in the record, required its engineers "to keep a constant and vigilant lookout for signals and the positions of switches while running, and not to pass red signals and red lights on the switches, but must stop and ascertain the cause." It is further provided by the rules that when a train stops or is delayed, or the main track is obstructed, the same must be protected by the flagman when necessary to prevent accident. In the case at bar, the deceased, confronted with the emergency stated, and in an endeavor to protect the property and interest of his employer, obstructed the main track by placing his engine at the water tank. But before doing so he sent out the flagman, with his red light and a torpedo, 1,120 yards in the direction from which 104 was coming, for the purpose of flagging it. The red switch light was also turned against it. The deceased knew that the rules of the company required Cofer, in charge of 104, to stop his train, and not to pass these red signals; and he had the right to assume that he would perform his duty under the rules, and would keep a constant and vigilant lookout for signals and switches, especially in a town; and, if Cofer had done so, decedent would not have been injured or killed. In view of the peculiar facts of this case, we are of the opinion that appellee's intestate violated the rules of the company in taking his engine out on the main track, and, if he had done so without sending out the flagman and turning the switch light, thereby giving notice or warning to the engineer of 104, the court should have given a peremptory instruction to find for appellant. But conceding that he erred in judgment as to his duty, the facts show that it was an honest mistake. His purpose was to protect the property of his master. He took all the necessary steps and precautions provided by the rules to notify and warn Cofer of his situation on the main track. Under these facts and circumstances, we are not willing to say that decedent cut himself off from all right of protection.

Appellants contend that unless the judgment is reversed, with directions to the lower court to grant them a peremptory instruction, we will, in effect, overrule the opinions in the cases of *L. & N. R. Co. v. Hiltner*, 56 S. W. 654, 21 Ky. Law Rep. 1826; *L. & N. R. Co. v. Scanlon*, 60 S. W. 643, 22 Ky. Law Rep. 1400; *L. & N. R. Co. v. Howard's Adm'r*, 82 Ky. 212; *N. M. & M. V. Co. v. Deuser*, 97 Ky. 92, 29 S. W. 973; and *Brown's Adm'r v. L. & N. R. Co.*, 97 Ky. 229, 30 S. W. 639. After an examination of the cases, we are of the opinion they do not apply to the facts of the case at bar. The last three cases were cases of ordinary trespassers, and at places where they had no right under any circumstances to be, and the company was not required to keep a lookout, and owed them no duty except to save them if discovered

Illinois Cent. R. Co. v. Stith's Adm'r

in time. The first two cases cited are cases where the engineers were injured by reason of the violation of rules, but they did not give or attempt to give the company or its agents in charge of other trains any notice or warning of their perilous positions, as required by the rules, so as to place the company or its agents under the duty of exercising care to avoid injuring them.

We are of the opinion that the principles announced in the following cases, when considered with reference to the particular facts of this case, negative the idea that appellants were entitled to a peremptory instruction: *L. & N. R. Co. v. McCoy*, 81 Ky. 415; *L. & N. R. Co. v. Earle's Adm'r*, 94 Ky. 368, 22 S. W. 607; *I. C. R. Co. v. Mahan*, 34 S. W. 16, 17 Ky. Law Rep. 1200; *Ca-hill v. Cincinnati, etc., R. Co.*, 92 Ky. 345, 18 S. W. 2; *L. & N. R. Co. v. Coniff's Adm'r*, 27 S. W. 865, 16 Ky. Law Rep. 298; *L. & N. R. Co. v. Adams' Adm'r*, 106 Ky. 859, 51 S. W. 577; *L. & N. R. Co. v. Löwe (Ky.)* 80 S. W. 770; and *Bowling Green Stone Co. v. Capshaw*, 64 S. W. 507, 23 Ky. Law Rep. 945, 65 L. R. A. 122. In the last case cited, Capshaw was an employee of the stone company. His duties were those of a carpenter in the company's mill. When he was injured he was in front of a truck for the purpose of testing the stone thereon to see if it had been sawed in straight lines, and while attending to this he was injured by the engineer backing the truck over his foot. The company claimed that Capshaw was not in a place or performing labor where his duties required him to be. This court in that case, in discussing an instruction, said: "We are of opinion that this instruction is erroneous and prejudicial to appellant, in the use of the phrase 'or by the exercise of ordinary care might have known.' This placed upon appellant the duty of keeping a look-out for appellee at a place where he voluntarily placed himself, without orders, direction, or duty to be. If appellee, outside of the duties which he was employed to perform, and without direction from Douglas, the superintendent, so to do, went voluntarily into a place of danger—in front of the truck—he should have called attention to his position, so that the hookers or engineer would know of his peril, and would then be under the duty of exercising care to avoid injuring him. If appellee, being thus situated, without directions from Douglas, and outside of his duties, failed to give the hookers or engineer notice of his position, he would be guilty of contributory negligence, for which he could not recover." The principles enunciated in this case seem to completely cover the one at bar; i. e., if appellee's intestate, in violation of the rules, went voluntarily into a place of danger, onto the main track, on the time of 104, he should have called attention to his position, so that those in charge of 104 would have known of his peril, and would have then been under the duty of exercising care to avoid injuring him. It appears that the deceased performed this duty, and gave notice of his position in the way and manner prescribed by the rules. The only question that should have been submitted to the jury was whether

St. Louis Southwestern Ry. Co. v. Pope

those in charge of the fast train, No. 104, saw, or by the exercise of ordinary care could have seen, the train in charge of Stith in time to have stopped or checked his train, and saved Stith from injury and death. If so, the appellee should recover; otherwise the finding should be for the appellants.

On the trial, appellee, over the objection of appellants, introduced in evidence some professed tests of the Westinghouse air brakes, appearing in the back of a book of instructions with reference to the use and operation of such brakes. We are of the opinion that the court erred in permitting this to be introduced as evidence. These professed tests were nothing more than advertisements of the makers for the purpose of inducing purchasers, and they seem not to have been prepared and issued by appellants.

For these reasons, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. POPE.

(Supreme Court of Texas, March 30, 1905.)

[86 S. W. Rep. 5.]

Injury to Brakeman—Assumption of Risk.*—A railroad brakeman did not assume the risk of a violation by other employees of a rule requiring cars standing on a grade siding to be coupled together.

Same—Contributory Negligence—Relying on Compliance with Rule.—Where a rule of a railroad company required cars standing on a grade siding to be coupled together, a brakeman passing along the roofs of the cars that had been standing on such a siding was not guilty of contributory negligence in assuming that the cars were coupled, as they appeared to be.

Same—Negligence.—It was negligence for a locomotive engineer to suddenly and violently stop a train when a brakeman was passing along the roofs of the cars.

Same—Same—Leaving Cars Standing Uncoupled—Instruction.†—A rule of a railroad company required cars standing on a grade siding to be coupled together, and, while cars that had been so standing were being moved in switching, the locomotive suddenly stopped, and certain cars which had not been coupled separated, so that plaintiff, a brakeman, passing along the top of the train, fell between them, and was injured. In an action for the injuries the court instructed that if it was not reasonably safe to leave cars standing together uncoupled, and that an ordinarily prudent person would not have left them uncoupled, and plaintiff was injured as the direct result of the uncoupling, a verdict should be returned for plaintiff in the absence of any contributory negligence. Held, that the instruction was erroneous, in that the jury might have found that the condition of the cars was unsafe as to others than plaintiff, and yet have returned a verdict against defendant.

Same—Negligence in Handling Train.—Where the rule of a railroad company required cars standing on a grade siding to be coupled, and

*See extensive note, 13 R. R. R. 218, 36 Am. & Eng. R. Cas., N. S., 218.

†See extensive note, 13 R. R. R. 498, 36 Am. & Eng. R. Cas., N. S., 498.

St. Louis Southwestern Ry. Co. v. Pope

an engineer, in moving cars that had been so standing, suddenly stopped the train, whereby certain cars not coupled parted, causing an injury to a brakeman, if the manner of stopping the engine would not have been negligence in case the cars were coupled, it was not negligence because of the conditions not known to the engineer.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by James M. Pope against the St. Louis Southwestern Railway Company of Texas. Judgment in favor of plaintiff (82 S. W. 360), and defendant brings error. Reversed.

E. B. Perkins and Marsh & McIlwaine, for plaintiff in error.
Johnson & Edwards, for defendant in error.

BROWN, J. James Pope sued the St. Louis Southwestern Railway Company of Texas to recover damages for personal injuries sustained by him, alleged to be due to the negligence of the company. A trial by jury resulted in a verdict and judgment for plaintiff, and defendant has appealed.

The facts are as follows: Plaintiff on the occasion in question was an experienced brakeman in the service of defendant, and was familiar with its line, sidings, rules, and customs. At a station on appellant's line called "Mt. Pleasant" there were five side tracks called "storage tracks." These were not used for the placing of cars for loading or unloading, but were designed and used for the storing of cars by incoming trains to be incorporated in subsequent outgoing trains. There was in force at the time in question the following rule, which had been promulgated by the company: "Conductors must see that brakes are set on cars they leave on sidings, and when the siding is on a grade, they must, when practicable, couple all the cars together; and in addition to setting the brakes the wheels must be blocked and safety switches properly adjusted. When not in use safety switches must be left open. In switching, trainmen must know that brakes are in good order before cutting off cars." As to whether it applied to the sidings at Mt. Pleasant the evidence is conflicting, but is ample to sustain the finding not only that the sidings at that point were upon such a grade as came within the purview of the rule, but that they had been so regarded by the company and its employees. At sidings not on a grade, or where it was necessary to place or "spot" cars for the convenience of those whose duty it was to load and unload them, the rule did not apply. At the date of the accident plaintiff came in on a freight train containing 28 cars. When they reached Mt. Pleasant it became necessary to back in on one of the storage tracks to store some cars. In doing this it was proper to back the train against a string of cars already on the siding, and push them toward the opposite end of the siding. Plaintiff occupied the position of rear brakeman on the train, and it was his duty to remain at the rear end of the train, to see that the coupling was made when the train touched the standing cars, to mount the standing cars, to

St. Louis Southwestern Ry. Co. v. Pope

walk on top of them to the rear end of them (that is to say, the end farthest from the engine), to see that the brakes were set, and to signal the engineer when they had been pushed far enough. It was the duty of the middle brakeman to signal the engineer to back up in pushing the cars in, and to transmit to him the signal of plaintiff when the cars had been pushed far enough. When the train in question entered the siding, plaintiff occupied a position at its rear. When it came in contact with the standing cars, he coupled the train to the nearest car, and the engineer proceeded to push them in the same direction. Plaintiff immediately climbed upon the nearest standing car, and, assuming them all to be coupled together, as they appeared to be, proceeded to walk to the rear in the discharge of his duty. When he reached the opening or space between the second and third cars from the end the engineer suddenly stopped the engine, causing the last two cars, which were not coupled to the others, to separate from the train and continue their motion. The train was stopped and the separation occurred on the instant that plaintiff was about to step from the third to the second car to the last, and he fell through the space thus made to the ground, injuring him as alleged. As the part of the train attached to the engine was stopped instantly, it did not run over plaintiff, his injuries being due entirely to his fall.

There is evidence to support the finding that the train was moving at the rate of four to six miles an hour, and that without warning and without slowing down it was instantly brought to a standstill. This was not done at the signal of plaintiff, but in response to a signal of the middle brakeman. The coupling apparatus on all the cars was automatic, and in good condition, but the lever on the coupling where the separation occurred was left fastened up, so that it could not be coupled by mere contact. The cars on the siding to which plaintiff coupled the train were all standing close together, as if coupled to each other, and were in fact all coupled, except where the separation occurred. There were other cars on the siding standing apart from these in question, and not coupled to them, but they were some distance away, and did not have the appearance of being coupled. The main purpose of the rule requiring them to be coupled when left on grade sidings was to make sure they would not by any chance roll out on the main track and wreck passing trains, the idea being that cars with defective brakes would thus be held by the brakes on the other cars. Plaintiff knew that on one or two occasions other brakemen had failed to observe the rule at points where the conditions required its observance, but he and others testified that it was generally observed, and these negligent lapses were the exception. A fair interpretation of the rule required cars apparently in contact with each other to be coupled, though there might be an open space between two sets of cars on the same siding. As to whether the rule was as often breached as observed, and as to whether the rule, if in force, was applicable to this particular siding, the evidence was in sharp conflict. We

St. Louis Southwestern Ry. Co. v. Pope

think the record supports the conclusion that the rule was in force, was applicable to the siding in question, was generally observed, that plaintiff did not assume the risk of the negligent violation of the rule by other employees, and was not guilty of contributory negligence in acting upon the assumption that the cars were coupled as they appeared to be, and could be safely crossed. The employees of the company were negligent in leaving the cars uncoupled when thus apparently coupled, and the engineer was negligent in suddenly and violently stopping the train. The accident would not have happened but for the sudden stopping of the train, and would not have resulted from that cause but for the uncoupled cars. Plaintiff's injuries were the result of the two causes combined.

The plaintiff in error challenges the correctness of the following paragraph of the charge given by the court to the jury: "If you find from a preponderance of the evidence that it was not reasonably safe to leave cars standing together uncoupled on the side track in Mt. Pleasant in question, then if you further find that the car from which plaintiff fell was uncoupled with, although standing together with, the car immediately south of same; then if you further find that an ordinarily prudent person would not have left the cars uncoupled under similar circumstances; then if you further find that plaintiff, while exercising ordinary care, was injured as the direct result of said cars being left uncoupled—then you will find for plaintiff, unless you find plaintiff assumed the risk of same being uncoupled, as explained under the eighth division of this charge, or was guilty of contributory negligence as explained in subdivision 8a of this charge." This charge submits as distinct and separate ground of recovery the fact that the string of cars upon the side track at Mt. Pleasant were left uncoupled. To determine the correctness of the charge we must consider it as if that were the only ground upon which the plaintiff sought to recover. To sustain the verdict of the jury upon the claim that the condition of the cars in being uncoupled was "not reasonably safe," the evidence must show that such condition rendered it unsafe for the plaintiff to do the work in which he was engaged when injured, and that the danger was so apparent that "an ordinarily prudent person," having in view the safety of the plaintiff, or others engaged in like work, would have anticipated and provided against the danger by causing the cars to be coupled together. If the evidence was sufficient to justify the submission of that issue—of which we express no opinion—the charge as given does not submit it to the jury. The issue presented by the charge is that, if the condition of the cars was not "reasonably safe," whether the danger was to the plaintiff or to some one else, and that the plaintiff was injured by reason of that condition of the cars, then he had a right to recover. The evidence showed that there was a rule of the company which required that cars left standing upon a grade track should be coupled and blocked, and that cars left upon the grade track at Mt. Pleasant uncoupled and without blocking were

St. Louis Southwestern Ry. Co. v. Pope

liable to run out upon the main track, which would be unsafe both for the cars and for persons engaged in operating trains upon the main line. Indeed, there might be many phases of unsafety consequent upon that condition, and persons engaged about the yards might be endangered by the fact that the cars were liable to run out unexpectedly. It is apparent from the charge, taken in connection with the evidence, that the jury might have concluded that the condition of the cars was unsafe as to others than the plaintiff, and yet, under the terms of the charge, they could have found their verdict against the defendant. It was not necessary that the railroad company should have been able to anticipate that the plaintiff would be injured, or that any person would be injured under exactly the same conditions that the plaintiff was, but, in order to render it liable, the danger of injury to some person engaged in the performance of like services as the plaintiff was then engaged in should have been so manifest that the law would require the company to anticipate and provide against the injury; otherwise there can be no negligence on its part as to the plaintiff in this case. Negligence cannot exist unless there is a duty to the person injured, and no duty to the plaintiff rested upon the railroad company unless the conditions were such that a prudent person would have anticipated and guarded against the occurrence which caused his injuries. *Shear. & Red. Neg.* vol. 1, § 8; *Sawyer v. Railway Co.*, 38 Minn. 105, 35 N. W. 671, 8 Am. St. Rep. 648. If all the facts grouped in the charge be true, they do not show that the railroad company owed to plaintiff the duty of coupling the cars on the side track; therefore would not support the verdict. The court erred in submitting the issue to the jury in the form in which the charge presented it.

We granted the writ of error in this case because we were of the opinion that there was no evidence of negligence by the engineer, but upon further consideration we have concluded that there was evidence which required that the court should submit that issue to the jury. As the case will be remanded for another trial, we think it proper to say that in our opinion the tenth paragraph of the court's charge unnecessarily connects the act of the engineer in stopping the engine with the fact that the cars were uncoupled. In the absence of evidence that the engineer knew that the cars were not coupled, under the evidence in the record the same liability would attach to the act of the engineer in negligently stopping the engine whether the cars on the side track were coupled or not. If the manner of stopping the engine would not have been negligence in case the cars were coupled, then it would not be made so by the existence of a condition not known to the engineer. We are of the opinion that, while the charge might not require a reversal of the judgment, it was calculated to confuse the jury in the consideration of the issue submitted.

The trial court erred in giving the charge hereinbefore copied, and the Court of Civil Appeals erred in affirming the judgment of the court below, for which errors the judgments of the said courts are reversed, and the cause remanded.

DUNN v. OREGON SHORT LINE R. Co.

(Supreme Court of Utah, March 15, 1905.)

[80 Pac. Rep. 311.]

Injury to Employee—Safe Place to Work—Negligence.*—A section gang, to facilitate the loading of ties on a car, which they were about to do, made a temporary platform at the end of the car, by placing ties lengthwise the track, between the rails, and extending two planks from the ground to such ties. After one of the crew had been loading the ties for two hours, he was injured while pushing a tie into the car, either by the slipping of one of the planks when he was on it, or by his slipping after stepping onto the ties between the rails, which were wet and muddy. Held, that plaintiff had assumed the risk.

Straup, J., dissenting.

Appeal from District Court, Cache County; C. H. Hart, Judge.

Action by Ephraim Dunn against the Oregon Short Line Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

In this suit the plaintiff seeks to recover damages for personal injuries which he claims he received through the negligence of the defendant. The answer denies the negligence charged, and alleges contributory negligence and assumed risk on the part of the plaintiff. As a witness in his own behalf, the plaintiff, among other things, testified, in substance, that on the morning of April 23, 1902, when he received the injury of which he complains, he was in the employ of the defendant as a section hand, and had been so employed for some time previous; that on the morning in question, after performing some other duties, he joined the rest of the section gang at Willard Station, where the men, under the direction of the foreman, were engaged in loading ties from the ground into a coal car, by putting them in at the end of the car, the end gate having been removed; that at the end of the car the men had constructed a platform (a temporary arrangement devised by them for the purpose of making the loading more convenient and easier, although the ties could have been loaded without it); that the platform consisted of six or seven ties laid lengthwise between the rails of the track, in front of the end of the car, and two planks, one end of each resting on the ties, without being nailed, and the other on the ground near the pile of ties (the planks, which were 12 feet long, 3 inches thick, and 12 inches wide, forming a runway, of an easy grade, for the men in carrying the ties to the car for the purpose of loading); that the planks taken for that purpose were of the ordinary crossing planks used along the road; that the floor of the car was about 3 feet from the ground; that when he got there to load ties

*For the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

Dunn v. Oregon Short Line R. Co

the platform had already been constructed, and he paid no particular attention to it, but saw it was there, and could observe it; that sometimes one man, and sometimes two, would carry one tie upon the platform to the car, and hand it to men on the car to load; that it had rained during the night and early morning, and the ties and plank were wet, and mud had been carried upon the planks and platform by walking upon them; that he observed this condition of the platform as he walked up and down on it, and felt the mud under his feet; that the platform was plainly to be seen, and he could observe it; that he had been carrying ties about two hours before the accident happened; that at the time of the accident he and another workman were carrying a tie; and that the other workman walked ahead and placed his end upon the car, when the plaintiff, endeavoring to push the tie further up to the man on the car, fell and injured himself. Respecting his fall and injury, the plaintiff says his feet were still on the planks, which, as he was pushing the tie, slipped backward, and caused him to fall forward, and that in falling he struck his chin either on the edge of the tie or on the end of the car, and that the end of the tie pinched off the fleshy part of the end of the index finger of his left hand. The foreman, who was an eyewitness to the accident, testified that the planks did not slip, and that the plaintiff was standing upon the ties beyond the planks, pushing the tie up, when he slipped and fell. In describing the injury on his chin, the plaintiff said: "My chin was scratched and bruised a little, and down my neck was also scraped slightly. The skin was just scratched a little. After I got home, some time after this accident, my chin and neck became discolored and swollen." Respecting what occurred when, after the accident, he called on Dr. Taylor, the local surgeon of the defendant, the plaintiff testified: "On the first visit the only thing needed was to dress my finger. I called his attention to my chin. When I called his attention to my neck, he said that was not anything, and did not think it would hurt me much." The plaintiff further testified: "I first went to see Dr. Taylor on the 23d of April, 1902. I think I only went to see him about my condition during a period of about three weeks. After I quit going to see Dr. Taylor the swelling and discoloration and everything else on my neck disappeared. This scar on my neck and this running sore near the Adam's apple never developed and never discharged or became sore at all until long after I quit going to see Dr. Taylor. I cannot remember just exactly when this sore on my neck did come. Not long after I quit going to see Dr. Taylor my neck swelled up quite large, and the swelling disappeared, and then about six weeks after the accident I first noticed this sore develop on my throat. The sore came some little time before it commenced to discharge. This condition of my throat developed something like two months after the original swelling and discoloration had gone away." It also appears from the evidence of the several physicians that the injury was of a temporary char-

Dunn v. Oregon Short Line R. Co

acter, and that the fistula on his throat can be cured by a simple surgical operation, concerning which Dr. Conroy, an expert witness for plaintiff, said: "The operation would not be a vital one. All that it would require would be that degree of skill and competency that we would expect of the average physician, who has given careful study, of the ordinary, approved character and skill in his profession." There appears to be no evidence showing that the fistula was directly traceable to the injury. Under this and other testimony of similar import, the jury returned a verdict in favor of the plaintiff for the sum of \$4,500, and judgment was entered accordingly.

P. L. Williams and Geo. H. Smith, for appellant.

L. R. Rogers and T. S. Perry, for respondent.

The case having been stated, as above, BARTCH, C. J., delivered the opinion of the court.

At the time of the submission of the case to the jury, the defense, inter alia, requested the court to charge as follows: "The court charges you in this case that, as matter of law, the plaintiff is not entitled to recover, and your verdict should therefore be for the defendant." This request was refused, and the action of the court in the premises has been assigned as error.

The appellant contends that the entire record presented a case involving the principle of assumed risk of the servant, and showed such a state of facts as made it the duty of the court to so charge the jury, and we are of the opinion that this contention is well founded. Upon careful examination of the evidence, the conclusion seems irresistible that the plaintiff has shown no right of recovery. We are unable to perceive, from the proof, wherein the company was guilty of actionable negligence. The plaintiff's own testimony fails to show it. The platform was but a simple arrangement, constructed by the men who were to load the car, for their own convenience, out of material not furnished by the company for such purpose. It was only a temporary thing, of their own invention, to enable them to perform their work more easily. The company had furnished no appliances other than the car, and this could have been loaded in the ordinary way, without the platform. The injured knew this; had assisted in loading ties on a previous occasion; saw the platform, and how it was constructed; saw that it was wet and muddy; must have known, or without inconvenience could have learned, that the planks were not nailed to the ties; and, without making any objection whatever to the contrivance, or the manner of loading the car, voluntarily, with the rest of the workmen, used the platform. After having so used it for a period of about two hours he slipped, fell, and was temporarily injured, but not severely. As to the fistula on his neck, the principal injury of which he complains, there appears to be no evidence to show that it was caused by or resulted from the accident—nothing to connect it with the accident. The injured himself said: "This condition

Dunn v. Oregon Short Line R. Co

of my throat developed something like two months after the original swelling and discoloration had gone away." If, under such facts and circumstances as are disclosed by this record, an employer would be liable to an employee in damages, it would seem difficult to conceive of a case of accidental injury where the employer would not be liable. That this is one of those unfortunate accidents for which there is no responsibility on the part of the employer, we entertain no doubt. It is clearly a case of an assumed risk incident to the employment.

We are aware of the general rule that, where a master employs a servant, he must exercise ordinary care to furnish the servant a reasonably safe place in which to perform the service, and a failure to do so will render the master liable for any injury to the servant resulting from such failure; but in this case we can perceive no violation of the rule that can avail the respondent, who, we have a right to assume, in the absence of evidence to the contrary, was a man of average understanding and knowledge of things about him. We cannot say from the proof that the place was not reasonably safe, but if it was not—if it was dangerous—the danger was open and obvious, and the employee could easily observe it, and had ample opportunity to discover it. Whatever hazard was connected with the loading of the ties was equally open and obvious to the employee as to the employer, if not more so; and, if there was anything unsafe about the platform, the exercise of ordinary care would have revealed it to the employee. He, having voluntarily engaged in such service, concurring in the use of the contrivance, observing its construction and temporary character, and, as a man of ordinary understanding and knowledge, aware of the dangers incident to the employment, and having, of his own volition, undertaken to perform the service in that way, must be held to have assumed the ordinary risks of injury incident to that service, including the risk of the injury in question, and cannot now be heard to complain. When in such case the servant assents "to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." *Sullivan v. India M. Co.*, 113 Mass. 396; *Cooley on Torts*, 634-636; *Higgins v. Southern Pac. Co.*, 26 Utah, 165, 72 Pac. 690; *Christenson v. R. G. W. Ry. Co. (Utah)* 74 Pac. 876; *Lovejoy v. B. & L. Railroad*, 125 Mass. 79, 28 Am. Rep. 206; *Baker v. Barber Asphalt Pav. Co. (C. C.)* 92 Fed. 117; *Sweeney v. B. & J. Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *McMillan v. Spider Lake S. M. & L. Co.*, 115 Wis. 332, 91 N. W.

Gila Valley, etc., Ry. Co. v. Lyon

979, 60 L. R. A. 589, 95 Am. St. Rep. 947; Williams v. D. L. & W. R. Co., 116 N. Y. 628, 22 N. E. 1117; Tuttle v. Milwaukee Railway, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.

We are of the opinion that the court erred in refusing to charge the jury as requested, and, having concluded that no right of recovery exists in this case, it becomes unnecessary to decide the other questions presented.

The case is reversed, with costs, and remanded to the court below for further proceedings in accordance herewith. It is so ordered.

GILA VALLEY, G. & N. RY. CO. v. LYON.

(Supreme Court of Arizona, March 30, 1905.)

[80 Pac. Rep. 337.]

Law of Case.—A ruling of the appellate court that the evidence is sufficient to carry the case to the jury is the law of the case, and conclusive upon a subsequent appeal from a judgment supported by substantially the same evidence as was before the court on the prior appeal.

Interrogatories—Statute.—Rev. St. 1901, par. 1427, providing that in all cases where more than one material issue of fact is joined interrogatories may be submitted to the jury by the court, is directory, and not mandatory, and leaves the matter of submitting interrogatories in any case to the sound discretion of the court.

Injury to Employee—Concurrent Negligence of Master and Fellow Servant—Proximate Cause—Liability.*—Where the negligence of a master contributes with the negligence of a servant to cause injury to another servant, such concurrent negligence on the part of the master and of the servant is the proximate cause of the injury, and the master is liable therefor, but where the negligence of the servant is such as to have caused the injury even had the master not been negligent, then the servant's negligence is the sole cause of the injury, and the master is not liable.

Same—Same—Liability—Instruction.—In an action for injuries to a servant the issue was whether the accident was caused in whole or in part by the negligence of the master, or was caused by the negligence of a fellow servant alone. The Supreme Court, on a prior appeal, had said in its opinion that, if the act of the servant was the "proximate" cause of the injury, it was immaterial whether such negligence was or was not coupled with the master's negligence, but, if the injury was caused both by the negligence of the fellow servant and the negligence of the master, the latter would be liable. The court charged that in determining whether the master was liable the jury were to find whether its negligence contributed to the accident, or whether the accident was brought about "solely" by the negligence of the fellow servant. Held, that the instruction was proper, and followed the opinion of the Supreme Court, notwithstanding the substitution of the word "solely" for "proximate."

Appeal—Review—Expert Testimony.—The determination of the competency of an expert witness to testify to his opinion is a matter which rests in the sound discretion of the trial court.

*See foot-note appended to Illinois Southern Ry. Co. v. Marshall (Ill.), 13 R. R. R. 95, 36 Am. & Eng. R. Cas., N. S., 95; foot-note appended to Hicks v. Southern Pac. Co. (Utah), 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332.

Gila Valley, etc., Ry. Co. v. Lyon

Appeal from District Court, Gila County; before Justice Kent.

Action by A. J. Lyon against the Gila Valley, Globe & Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank W. Burnett, for appellant.

Falvey & Davis and *George R. Hill*, for appellee.

SLOAN, J. This is the second appeal in this case. Upon the first appeal the judgment rendered in the court below in favor of the appellee was reversed, and a new trial granted upon the ground of error in the giving of an erroneous instruction and in refusing to give a proper instruction. 71 Pac. 957. Upon a re-trial of the cause a verdict was again found by the jury in favor of the appellee, and a judgment entered thereon. From the ruling of the court denying its motion for a new trial and from the judgment appellant brings this appeal.

The first error assigned is based upon the refusal of the trial court to instruct the jury, at the conclusion of the evidence, to return a verdict for the defendant upon the ground, as stated in the motion made in that behalf, that the evidence failed to make out a case of negligence on the part of the defendant railroad company. The evidence adduced upon the second trial was substantially the same as upon the first trial. We held upon the first appeal that this evidence was sufficient to warrant the submission of the question of negligence on the part of the railroad company to the jury. It is settled law that all rulings made by the appellate court upon a first appeal become the law of the case, and are conclusive upon any subsequent appeal. *Roberts v. Cooper*, 20 How. 467, 15 L. Ed. 969; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; *U. S. v. Neustra Senora de Regla*, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662.

Counsel for the appellant, before the argument of the case, requested the trial court to submit certain special interrogatories to the jury for their answer. The court expressed a willingness to do this, but found exception to the wording of one of the interrogatories submitted, and suggested an amendment thereto. Counsel declined to consent to any amendment to the interrogatory, whereupon the court refused to submit any special question to the jury. This ruling is assigned as error. At common law the practice of submitting special interrogatories to a jury was not allowed, and the finding of the jury was restricted to a general verdict or a special verdict, as it might elect. In certain of the older states a practice originated at an early day of the court submitting certain questions to the jury to be answered by them as supplementary to a general verdict. In many of the states this practice has been incorporated into the statutes. As a rule, these, unless mandatory in terms, are construed as permitting the practice, but leaving it to the sound discretion of the trial court whether it be followed in any particular case. Paragraph 1427,

Gila Valley, etc., Ry. Co. v. Lyon

Rev. St. 1901, reads: "In all cases, whether law or chancery, where more than one material issue of fact is joined, interrogatories may, under proper instructions, be submitted to the jury by the court in writing," etc. A cursory reading of this statute discloses that it is directory, and not mandatory, and that it leaves the matter of submitting the interrogatories in any case to the sound discretion of the court. Such has been the ruling of this court. *Mercantile Co. v. Clack* (Ariz.) 71 Pac. 925.

Exception is taken to the oral charge of the court, in that it does not follow the law as laid down by us upon the first appeal. That part of the charge of the court complained of reads as follows: "If the accident causing the death was brought about by the negligence of the dead man himself, or his negligence contributed thereto, then you cannot, gentlemen, find a verdict against this defendant company. If the accident was brought about solely by the negligence of the conductor of the train, a fellow servant, the defendant company is not responsible in damages, and you cannot find a verdict against the defendant in this case. Negligence, for the purpose of this case, I will define to be a failure to use such care as a person of ordinary prudence would use under like circumstances. Now, in this case the conductor of the train was a fellow servant of the man who was killed, and, if the accident was brought about solely by the negligence of the conductor of the train, then the defendant company is not liable; or if the accident was brought about by the negligence of the conductor and the negligence of the man who was killed, the defendant company is not liable. If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent in not providing such safe place. The fundamental question, therefore, for you to determine in this case, is, what was the cause of this accident—what brought it about? If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man has, through his own negligence, brought about this accident, or contributed to it, then you should find for the defendant, and you should not award any damages in this case. On the other hand, if you find that the defendant company was negligent in not providing a reasonably safe place for the performance of the work, you should find for the plaintiff, and award her damages, provided that the negligence of the defendant in not providing such safe place was the cause of the accident, or contributed to the accident. To find for the plaintiff, it is not enough that you should find that the premises were unsafe, or that the defendant company was negligent, in that respect, in not providing a safe place. You

Gila Valley, etc., Ry. Co. v. Lyon

must also find that the place was unsafe, and that the accident was brought about or contributed to by reason of that unsafe place. That is, if you should find that the act of the conductor was the sole, or if you should find that it was the proximate or the procuring, cause of the accident, then you should not award damages; but if you find that the accident was caused by the acts of the conductor and also by the negligence of the defendant company in not providing a safe place to do the work, then you should find damages for the plaintiff. In other words, in order to award damages to the plaintiff, you must find, first, that the defendant company was negligent in not providing a safe place to do the work, and that such negligence was the cause of the accident or contributed thereto. If you find the accident was brought about solely by the acts of the conductor, you should not award damages. If the acts of the conductor alone did not cause the accident, but the accident was contributed to by the negligence of the defendant company by not providing a safe place to work, then you should award damages. In determining this case, gentlemen, you should take into consideration all the evidence in the case. You are the sole judges of the evidence, or the weight to be given it, and of the credibility of the witnesses; and from the evidence before you you should determine these questions: First. Was the place where the deceased was working a reasonably safe place for the performance of the work to be done there—a reasonably safe place considering the character of the work to be done and the character of the premises? Second. If you find it was not reasonably safe, and the defendant company was negligent in that respect, did that fact have anything to do with the accident, or was it caused by the negligence of the conductor of the train alone? If it was caused solely or procured or brought about by the negligence of the conductor, then the defendant is not liable. If the negligence of the defendant company contributed to the accident, then the defendant is liable, provided the dead man himself was not guilty of any negligence which contributed to the accident." Upon the first appeal we said: "If the act of the conductor was the proximate cause of the injury, then it made no difference with respect to the freedom from liability of the defendant, as a matter of law, whether the negligence of the conductor was or was not coupled with the defendant's negligence. It is, of course, well settled that, if the injury was caused both by the negligence of the fellow servant and the negligence of the master, then the master is liable. His negligence is then a contributory or co-operative cause, for which he is liable. But when the proximate cause of the injury is the negligence of a competent fellow servant no recovery can be had, even though the place or appliances are defective, and the master is negligent in that respect; and whether such negligence of the fellow servant was the proximate cause, or whether the defendant's negligence was a contributory cause, is ordinarily a question for the jury." The trial court, in his oral charge, used the term "proxi-

Gila Valley, etc., Ry. Co. v. Lyon

mate cause," as applied to the negligence of the conductor, as synonymous with "sole cause." It becomes important to determine whether this language of the charge, implying that, unless the negligence of the conductor was the "sole cause" of the injury, the defendant was liable, is inconsistent with the declaration of law laid down by us. It is apparent that in that part of our former opinion which we have quoted we used the term "proximate cause" as implying the opposite of concurring or contributory cause. This use of the term "proximate cause" in the opinion was proper enough, and was not misleading when construed in the light of the context. It was not, however, in its application to the subject-matter of the charge to the jury, the only term, or, indeed, the best term, to convey the meaning of the court. Strictly speaking, where an accident is caused by reason of concurring acts of negligence on the part of the defendant and another, the negligence of neither can be said to be the "proximate cause," nor is the term "proximate cause" properly used in designating the cause of the accident. The term "proximate cause," in the sense in which it is ordinarily used, means the efficient cause, which, in a natural and continuous sequence, unbroken by any new and independent cause, produced the event, and without which that event would not have occurred. If the event cannot be said to be the natural and continuous sequence of the act of negligence, then such negligence becomes remote, and not proximate. *Insurance Co. v. Boon*, 95 U. S. 130, 24 L. Ed. 395; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 470, 24 L. Ed. 256. Where an accident is the natural and continuous sequence of concurring acts of negligence committed by two or more persons, such concurring acts of negligence become the proximate cause of the accident. *Kraut v. Frankford*, 28 Atl. 783, 160 Pa. 327. It is only when the negligence of either of two persons, shown to have been guilty of negligent acts, was a sufficient cause in itself, in the sense that the event would naturally have resulted therefrom independent of the negligence of the other, that the negligence of the former can be said to be the proximate cause. In such event the proximate cause becomes the sole cause.

In the case at bar it was the duty of the railroad company to have exercised reasonable care and caution to construct and maintain its spur at the place where the accident occurred so as to guard against such accidents as might reasonably have been foreseen as liable to happen. If it failed in its duty in this respect, it was guilty of negligence, and, if this negligence contributed to the accident in the sense that otherwise it would not have occurred, then its negligence, coupled with the negligence of the conductor in operating the train, became the proximate cause. On the other hand, if the conductor was guilty of negligence in operating the train, and this negligence, coupled with the negligence of the railroad company in the matter of the construction and maintenance of its spur, was the cause of the injury,

Gila Valley, etc., Ry. Co. v. Lyon

such negligence on the part of the conductor was a concurring or co-operative cause, but not the sole cause. If the negligence of the conductor was such as would have resulted in the accident even had the railroad company exercised due care and diligence, then the negligence of the conductor would have been not only the "proximate," but the "sole," cause of the injury, and the railroad company would not be liable. The issue raised by the pleadings and submitted was whether the accident was caused in whole or in part by the negligence of the company. The question whether the company was liable would be answered in the negative were the jury to say that the conductor's negligence was the sole cause of the accident, for, if the sole cause, then no negligence on the part of the company could have contributed to it. The court did, therefore, properly charge the jury that in determining the question whether the company was liable for the injury they were to find whether negligence on the part of the company contributed to the accident, or whether it was brought about solely by the negligence of the conductor. We think the instructions complained of are consistent with the holdings of the court upon the former appeal, and we think they, considered as a whole, could not have misled the jury to the prejudice of the defendant. The instruction requested by the defendant and refused by the court, and which was made the subject of the eighth assignment of error by appellant, was clearly not the law, for the reason that it contained an improper definition of "proximate cause," as we have herein defined the term, and for the additional reason that it did not give effect to our former declaration of law relating to the effect of concurring or co-operative acts of negligence.

None of the other assignments of error relating to instructions given and others refused present reversible error.

With regard to the last assignment of error, which relates to the admission of the testimony of certain "expert" witnesses and the objection of the defendant that these were not shown to be competent to give their opinion as to the safety of the place where the deceased was at work, it is sufficient to say the question of their competency was a matter that rested in the sound discretion of the trial court, and we do not find that this discretion was abused. *Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487.

The judgment is affirmed.

DOAN and DAVIS, JJ., concur.

ROSNEY v. ERIE R. Co.

(Circuit Court of Appeals, Second Circuit, January 25, 1905.)

[135 Fed. Rep. 311.]

Master and Servant—Injuries to Servant—Fellow Servants.*—All of the employees of a railway company engaged in operating either of two colliding trains were fellow servants of a fireman on one of the trains.

Same—Negligence—Question for Jury.—In an action for injuries to a locomotive fireman in a collision between his train and a train engaged in switching in a railroad yard, evidence held insufficient to require submission to the jury of defendant's alleged negligence in failing to provide sufficient help on the switching train, and in providing a yard crew incapacitated from overwork.

Same—Yard Rules—Sufficiency.—Where a railroad rule provided that yard limits at certain points were designated by signs, and that it would not be necessary for any engine or train occupying the main track inside of the yard limits to be protected by flagmen, except when in the time of a first-class train, it was explicit in meaning, and sufficient to protect a train on the main track within the yard limits of one of the places so designated against collision with a switching train in the yard.

Same—Automatic Couplers—Air Brakes—Statutes.—Act March 2, 1893, 27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, 32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1903, p. 367], requiring common carriers engaged in interstate commerce to use automatic couplers and air brakes on engines and cars used in interstate commerce, has no bearing in an action for injuries to a fireman by a collision in a railroad yard, where there was no proof that the engine and cars in collision were used in interstate commerce.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. Delos Kneeland, for plaintiff in error.

Frederic B. Jennings and *Winfred T. Denison*, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The action was brought by the plaintiff, as widow of John H. Rosney, to recover damages for his death which occurred at 6:40 o'clock on the morning of December 27, 1901, at East Honesdale, Pa., while he was in the employ of the defendant as fireman, by reason of a head-on collision between his engine and another engine belonging to the defendant. The engine on which Rosney was employed (No. 1,314) was engaged in hauling a train of 55 or 60 empty coal cars from Hawley to East Honesdale under orders directing that the engine "run extra" between these places. So far as mechanical means and appliances are concerned this train was in perfect condition. The engine and train were provided with air brakes properly con-

*As to whether trainmen of different trains are fellow servants, see foot-notes appended to *Morrison v. Northern Pac. Ry. Co.* (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233.

Rosney v. Erie R. Co

nected and when the train started from Port Jervis, the evening before the accident, the headlight and two classification lights were burning brightly. The train was properly manned: in addition to the engineer and fireman there was a conductor, a flagman and two brakemen, six in all.

The switching train with which the extra freight train collided in the yard at East Honesdale consisted of 13 or 14 loaded cars drawn by engine No. 1,160. The engine was provided with air brakes but the air brakes on the cars were not connected. The crew consisted of an engineer, fireman and two brakemen. The extra freight had just pulled into the yard and had almost come to a standstill at the water tower, where the engineer intended to take water, when the collision occurred. That the engine had almost stopped is demonstrated conclusively by the photographs in evidence which show the engines in collision almost directly opposite the water tower. The switch engine was also moving slowly just before the collision, not exceeding from two to four miles an hour. The impact was not serious, the damage to the engines being comparatively slight and the damage to the cars infinitesimal. The yard rule was as follows:

"Yard Limit at the following named points are designated by Yard Limit Signs: Port Jervis, Lackawaxen, Hawley, East Honesdale and Deposit. It will not be necessary for any engine or train occupying the main track inside of the yard limits to be protected by Flagmen, except when in the time of a First Class Train. All trains must be governed accordingly."

We incline to agree with the statement of plaintiff's brief that "there is not a scintilla of proof that the crew on the train drawn by No. 1,314 were in any wise negligent." The only fault imputed to them is that the headlight was out immediately preceding the collision. On the proof this was a question of fact which, if at all relevant to the decision, should have been submitted to the jury, but in our view it is not material to the present issue. If the light were out it was due to the carelessness of the engineer of the road engine; if it were alight the engineer of the switch engine should have seen it. In neither event can any fault be imputed to the defendant. All of the employees of the defendant engaged in operating either of the colliding trains were co-servants with Rosney. *New England Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Northern Pacific Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Northern Pacific Railroad v. Poirier*, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72. Therefore, if the collision happened because of the negligence of one or more of these men without contributing fault on the part of the defendant it is manifest that the plaintiff cannot succeed. If, as we have seen, the collision were due to the light being out on engine No. 1,314 that was the fault of the engineer. It was equally his fault if, after seeing the switch engine, he failed to stop promptly. If the collision were due to the absence of Murtha, the switchman, temporarily, from

Rosney v. Erie R. Co

his post, or to the failure of the engineer or fireman of engine No. 1,160 to see the approaching train or to reverse the engine or apply the air brakes in time, the carelessness must be imputed to these men respectively.

But the plaintiff contends that it should have been submitted to the jury to say whether the defendant was not in fault,—First; in failing to provide sufficient help upon the switching train: second; in providing a yard crew incapacitated from overwork: third; in failing to provide sufficient rules and a proper system for the management of the yard.

In approaching the consideration of these questions, it is wise to bear in mind that in an action by a servant no presumption of negligence attaches from the happening of the accident and that the burden is upon the plaintiff to establish, as an affirmative fact, that the employer has been guilty of fault.

In *Patton v. Texas & Pacific R. Co.*, 179 U. S. 658, at page 663, 21 Sup. Ct. 275, at page 277 (45 L. Ed. 361), the court says:

“It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.”

There is no evidence that the yard crew was insufficient to do the work required. There was an engineer, a fireman and two brakemen. The fact that but one brakeman was aboard at the time of the collision was not the fault of the defendant. The other brakeman had stopped at the depot for a moment but for what purpose is not disclosed. That such a crew was incompetent to do the work in a switching yard where trains are necessarily composed of comparatively few cars and where high speed is impossible, has nowhere been shown. Although the train in question had but 13 or 14 loaded cars it is argued that if there had been another brakeman on the front of the train “this accident would have been averted.” The argument in effect concedes the point that two brakemen were sufficient, and two brakemen were provided by the defendant. Whether a second brakeman on the train would have prevented the accident is, of course, conjectural. The train was a short one; it was proceeding at a slow rate of speed and if the engineer had seen the road engine in time, he could, in all probability, by using the air brakes on the engine, have stopped in time, even had there been no brakeman at all on the train. A second brakeman might have assisted in stopping the train if he had seen the other engine in time, but whether he would have done so is wholly problematical. It is enough that there is no evidence that one brakeman was unable

Rosney v. Erie R. Co

to do the work at the Honesdale yard and certainly there is no evidence that two brakemen could not have done the work.

The entire argument of the insufficiency of the crew is based upon the inferences of ingenious counsel unsupported by the evidence. The same crew had been employed in the yard for a year prior to the accident and it is not pretended that they were incompetent or that there had been the least difficulty in handling the business with promptness, care and prudence.

The case of *Flike v. Boston & Albany Railroad*, 53 N. Y. 549, 13 Am. Rep. 545 and the similar case of *Booth* against the same defendant, 73 N. Y. 38, 29 Am. Rep. 97, are not in point. In these cases the defendant was held liable because it sent out regular freight trains inadequately supplied with brakemen on a road where the grades were heavy and where the trains were dispatched only five minutes apart. The trains broke in two, as they were liable to do; the brakemen were unable to control the rear portions and collisions occurred with engines which were following. In the case at bar all these elements are wanting. There is no proof of similar accidents occurring in the Honesdale yard; no proof that two brakemen were unable to control a train of 14 cars, and no proof that the accident was caused by any neglect of duty in this regard on the part of the defendant. Negligence cannot be supported by theories based upon the imagination of counsel.

The argument that the switching crew was incapacitated for performing their duties by long-continued overwork is also based upon inference. It is another instance where theory is opposed, irreconcilably, to fact. One of the witnesses testified that the crew had worked from 16 to 18 hours daily for a month preceding the accident, another, that the average was about 14 hours. But it also appears that, before beginning the trip on which they were engaged at the time of the accident they had been off duty for 12 hours and that they had been allowed an hour each for dinner, supper and at midnight. We are not here concerned with the question whether or not the hours were too long or the work too arduous; the only pertinent question is, were the men unable to discharge their duties; were they asleep, unconscious, dazed or incompetent? Were they incapacitated by overwork either mentally or physically? Not only is there a total absence of proof that they were in this condition, but, on the contrary, the evidence shows that they were all awake, watchful and alert. It may be conceded that 16 hours a day is too long a period for any human being to toil, but it does not follow that one who labors that length of time becomes, by reason thereof, an inefficient workman. In the present instance, so far as we can judge from the testimony, the work was not of a particularly engrossing character, it did not require great physical or mental exertion. It is, however, enough to say that where the undisputed fact appears that the men were wide awake there is no room to indulge in the inference that they were asleep. There

Rosney v. Erie R. Co

is not, so far as the record discloses, the slightest evidence connecting the collision with the previous hours of employment.

Again, it is argued that the yard rule, heretofore quoted, was improper, ambiguous and insufficient. It is urged that it was incumbent on the defendant to provide a safe and intelligible system for the government of its yard and its failure to do so was negligence. The yard rule is clear and explicit: there is no mistaking its meaning. A train occupying the main track within the limits of the yard at Honesdale is not required to protect itself by flagmen except during the time that a first class train is expected. The extra freight train, therefore, had no right to expect a flagman to give warning of the presence of the switching train on the main track. The absence of a flagman did not indicate a clear track through the yard and each train was required to take notice that another train might be approaching, and proceed with caution. In the absence of proof to the contrary the court cannot say that this rule was unsafe or improper. It had been in use for some time and no accident had occurred because of it, no railroad expert has condemned it, and it appears to be similar in language and identical in principle to rules upheld and commended by the courts in other cases. In making these rules the effort of the railroads unquestionably is to adopt the plan which will afford the surest and safest protection to life and property. The dictates of humanity and self-interest alike impel to this course and the courts are slow to substitute their judgment upon questions of railroad management for the judgment of practical men who have spent their lives in solving such problems. No one can read the rule in question without being impressed with the fact that its purpose was to enjoin the utmost caution upon all trains using the main track in the yard. A first-class train seeing no flag could run through at regulation speed but all other trains were required to slow down and proceed under perfect control. Some of the additions and amendments suggested by counsel are plainly impracticable and have been criticised and rejected by the courts. If the defendant had attempted to make a rule to cover all possible contingencies—such a condition, for instance, as existed on the morning in question, with falling snow and slippery tracks,—it would have resulted, as such attempts generally do, in lamentable failure. An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.

In *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, the Supreme Court says:

“The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. * * * It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere

Rosney v. Erie R. Co

sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant."

To the same effect are *Maher v. Railway*, 106 Fed. 309, 45 C. C. A. 301; *Southern Railway v. Craig*, 113 Fed. 76, 51 C. C. A. 53; *Morgan v. Hudson River Railroad*, 133 N. Y. 666, 31 N. E. 234; *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57; *Little Rock v. Barry*, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349.

Counsel for the plaintiff has shown great industry in collecting authorities bearing upon the duties of the master to his employees, but we think that none of them would have justified the trial court in holding that the yard rule was inadequate or improper, or in submitting the question of its inadequacy to the jury. There was nothing to show that the rule had been ineffectual in the past and no testimony that the changes suggested in the brief would have improved it. The court in the *Berrigan Case*, *supra*, says:

"In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury."

In *Larow v. N. Y., L. E. & W. R. R.*, 61 Hun, 11, 15 N. Y. Supp. 384, the court says:

"If the principle involved in this case is to be upheld, it would seem to follow that in every case of an injury to an employee ingenious counsel would be able to invent some rule and claim that it should have been adopted and promulgated by the company, and thus present a question as to the defendant's negligence. * * * I am of the opinion that before a railroad company can be found guilty of negligence in not making and promulgating any certain rule, it must at least be shown that the rule is practicable, proper, and, if observed, would give reasonable protection to its employees."

No amount of care and caution on the part of the rule maker could have foreseen the unfortunate combination of circumstances which resulted in Rosney's death. The accident happened because of the mistake of the train crews, one or both, which no finite intelligence could have anticipated.

The act of Congress of March 2, 1893, 27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174], amended March 2, 1903, 32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1903, p. 367], requiring common carriers engaged in interstate commerce to use automatic couplers and air brakes on engines and cars used in interstate commerce has no bearing upon the present controversy.

Hilton v. Fitchburg R. R

Assuming that the act applies to cars being shunted about in a switching yard where, from the nature of the business it would be impracticable, if not impossible, to connect up the air brakes, it cannot be invoked in the present instance for the reason that there is no proof that the engine and cars were used in interstate commerce. In *Johnson v. Southern Pacific Co.* (decided Dec. 19, 1904, by the Supreme Court) 25 Sup. Ct. 158, 49 L. Ed. —, the engine and car in question were both used in interstate commerce.

It is unnecessary to consider the exceptions to the admission and rejection of testimony as they have no appreciable bearing upon the principal question.

We are clearly of the opinion that the plaintiff has failed to prove any negligence on the part of the defendant.

The judgment is affirmed.

HILTON v. FITCHBURG R. R.

(Supreme Court of New Hampshire, Cheshire, Dec. 6, 1904.)

[59 Atl. Rep. 625.]

Duty of Master as to Employing Other Servants.—The master's duties to a servant embrace the exercise of care to supply a sufficient number of workmen, and to retain in his service none but suitable servants.

Same—Presumption.—In an action by a servant for injuries, owing to an alleged breach by the master of his duty to provide competent workmen, in the absence of evidence to show a want of care in such regard it is to be presumed that proper care was exercised.

Negligence of Foreman.—Where a blacksmith employed in a railroad repair shop was usually assisted by a helper who delivered left-handed blows on the head of a "set" held by the blacksmith, and he, on applying to the foreman for a helper, was furnished with a right-handed striker, who, owing to his unskillfulness in delivering left-handed blows, injured the blacksmith, the master was not liable, as the foreman was not bound to have anticipated that the helper would attempt to do that in which he was not skilled.

Same—Fellow Servants.*—Where a railroad employed in its repair shop a requisite number of servants who were skillful in doing certain work, but the foreman of the shop negligently detailed on such work an unskillful servant, whose lack of skill caused an injury to another servant, the master was not liable.

Transferred from Superior Court.

Action by Thomas Hilton against the Fitchburg Railroad. At the close of the plaintiff's evidence the defendant's motion that a verdict be directed in its favor was denied, subject to excep-

*As to whether a foreman is a fellow servant of a hand working under him, see foot-note appended to *Whittlesey v. New York, etc., R. Co.* (Conn.), 13 R. R. R. 104, 36 Am. & Eng. R. Cas., N. S., 104; *Fogarty v. St. Louis Transfer Co.* (Mo.), 11 R. R. R. 578, 34 Am. & Eng. R. Cas., N. S., 578; *Vartanian v. New York, etc., R. Co.* (R. I.), 10 R. R. R. 380, 33 Am. & Eng. R. Cas., N. S., 380.

Hilton v. Fitchburg R. R

tion, and the case was taken from the jury. Transferred to the Supreme Court. Judgment for defendant.

The evidence tended to prove the following facts: On April 1, 1898, the plaintiff was employed as a blacksmith in the defendant's repair shops in Keene. His work was tempering and setting springs for locomotives. This was usually done by two blacksmiths and two helpers working together, and a part of it required the striking by one of the helpers upon the head of a tool called a "set," which was held by the plaintiff. The position and arrangement of the work was such that these blows should be swung sideways and left-handed, and the work could be more conveniently and better done by a left-handed striker. Some workmen strike right-handed, some left-handed, and some both ways; but those who strike from one direction cannot ordinarily deliver blows from the other. In the plaintiff's work the left-handed blows were usually struck by a helper who was absent on the day of the accident. The plaintiff informed the defendant's foreman of his regular helper's absence, and asked that one Murray, another helper, might take his place. The foreman said that the plaintiff could not have Murray, but might have Carlson, a right-handed striker, who was helper to another blacksmith, and who had been employed by the defendant for about nine months. Carlson was thereupon furnished as helper to the plaintiff, who directed him in the work. The second left-handed blow struck by Carlson did not land fairly on the head of the set, but struck upon one side, causing a small particle of steel to fly off and strike the plaintiff in the eye, causing the injuries complained of. There was no evidence that the defendant's foreman knew Carlson was a right-handed striker only, or that he was aware of the fact that the plaintiff's work required a left-handed striker, or could be better done by such a workman. Nor did it appear that the foreman was an unsuitable man for his position, or that Carlson was not a competent right-handed striker. Nothing was said by the plaintiff to the foreman as to the qualifications of the striker he required or desired.

John E. Allen, for plaintiff.

John M. Mitchell, for defendant.

PARSONS, C. J. Upon the view of the evidence most favorable to the plaintiff, the immediate occasion of his injury was a misdirected, left-handed blow struck by the helper Carlson, which, instead of landing fairly upon the head of the tool held by the plaintiff, struck it upon one side, thereby breaking off a small particle of iron, which struck the plaintiff's eye, causing the injury. Carlson was without skill in striking left-handed blows, and might be found guilty of negligence in attempting to do what it might be found he ought to have known he had not the skill to do without risk of injury to his fellow servant. There is no contention that the defendant is liable for Carlson's negligence. Recovery is sought upon the ground of a breach of the nondele-

Hilton v. Fitchburg R. R

gable duty owed by the defendant to the plaintiff to exercise care to provide him with reasonably suitable instrumentalities for his work.

One obligation of the master with reference to the instrumentalities of the work is the exercise of care to supply for the work a reasonably sufficient number of competent workmen, and to employ and retain in his service none but reasonably competent and suitable servants. *Galvin v. Pierce*, 72 N. H. 79, 81, 54 Atl. 1014; *Bailey, M. & S.* 3. Relying upon the breach alleged as the cause of the injury, the burden was upon the plaintiff to establish his claim by proof. In the absence of evidence tending to show a want of care, it must be presumed that such care as the occasion demanded was exercised. The rule is the same as to any instrumentality which it is the duty of the master to furnish, and applies in the case of the employment of servants as well as in the furnishing of materials and the promulgation of rules. *Manning v. Manchester Mills*, 70 N. H. 582, 49 Atl. 91; *Hill v. Railroad*, 72 N. H. 518, 57 Atl. 924; *Wabash Ry. v. McDaniels*, 107 U. S. 454, 457, 460, 2 Sup. Ct. 932, 27 L. Ed. 605; *Bailey, M. & S.* 55. If the proper performance of the work in the defendant's repair shop required that helpers who could strike left-handed should be employed and at hand for service, in the absence of evidence to the contrary it must be presumed that a reasonably sufficient number of such workmen were so employed for use when required.

There was no evidence that Carlson was not a suitable right-handed striker. It appeared that some workmen are able to strike with skill only right-handed blows and some only left-handed blows, while some are equally skilled in striking either way. It is a matter of common knowledge that comparatively few men are equally skilled with either hand, and, as it is apparent that the work of the defendant's repair shop must have required men who could strike right-handed as well as left-handed blows, it cannot be urged that the defendant was negligent because it retained in its service a striker who was neither ambidextrous nor left-handed. There was no evidence that, so far as the defendant knew, or ought to have known, Carlson was not a sober, careful, and competent workman, or that he was not so in fact. The only suggestion of carelessness against him is that which brought about the injury in this case. There is no evidence of such an act before this time, or of a general habit of carelessness. Hence it cannot be found that the defendant knew, or ought to have known, that he would carelessly attempt to do that which he had not sufficient skill to safely perform. The master does not warrant the competency of any of his servants to the others. The extent of the undertaking is that the master will exercise reasonable care in the selection of an employee, and, if his incompetency is discovered, that he will dismiss him from his service. *Wright v. Railroad*, 25 N. Y. 562, 566; *Columbus, etc., Ry. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 573; *Blake v. Railroad*, 70 Me. 60, 35 Am. Rep. 297.

Hilton v. Fitchburg R. R

The real claim upon the evidence is that the foreman was negligent in assigning Carlson as a helper to the plaintiff. There was no evidence that the foreman was not a suitable man for the place, and consequently there was no fault or negligence on the part of the defendant in employing him. *Summersell v. Fish*, 117 Mass. 312, 317. There was no direct evidence that the foreman knew Carlson could not strike left-handed blows, or that the plaintiff's work was customarily done in that way; but, assuming that from his position knowledge on these points on his part might be inferred, there appears to be nothing in the case upon which to base the inference that the foreman ought reasonably to have anticipated that Carlson, in acting as helper for the plaintiff, would negligently attempt to do what he was without the necessary skill to do safely. The plaintiff's work could be better or more conveniently performed with the assistance of a helper who could strike left-handed blows, but it could be done otherwise. Although the left-handed work was usually done by the helper whose place Carlson took, there was no evidence that the work might not have been done by the other regular helper. But assuming that Murray was a left-handed striker, and that on the evidence the foreman might be found guilty of negligence in telling the plaintiff he could not have Murray, for whom he asked, but could have Carlson, is the defendant responsible for such negligence?

The responsibility of the master is not determined by a difference in rank between the servant injured and the one in fault, or by the fact that the servant guilty of negligence is foreman or in control of others, but upon the nature of the act complained of, whether it is an act of service or an attempted performance of a nondelegable duty of the master. *Wallace v. Railroad*, 72 N. H. 504, 57 Atl. 913; *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014; *McLaine v. Company*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522. The principle involved in determining whether the act in question is one of service or master-ship is not "derived from exact or ingenious definitions of the words 'place,' 'tools,' or 'appliances,' however convenient and useful they may be in a particular case, but from considerations of the requirements of ordinary and reasonable care on the part of both the employer and the employee. If, as a matter of fact, a particular course of conduct on the part of the master toward his servant is unreasonable when measured by the conduct of men in general engaged in similar occupations, he cannot shield himself, as a matter of law, from the consequences of such conduct, by a resort to verbal distinctions, which oftener serve to obscure than to elucidate legal principles." *English v. Amidon*, 72 N. H. 301, 303, 304, 56 Atl. 548, 549. Similarly, if it is plainly unreasonable that a particular duty should be personally imposed upon the master, such imposition cannot be derived from the extension of the duty beyond what can fairly be termed reasonable by logical deduction from the terms usually employed in defining the duty.

Hilton v. Fitchburg R. R

The duty of the master to furnish his servants tools and appliances is as extensive, if not more so, than that to supply competent fellow servants. Implements and machinery naturally deteriorate from use and lapse of time, but additional experience tends to make a competent employee more competent; and the same degree of care may not be required in examination and inspection as to each instrumentality after suitable ones are once furnished. *Chapman v. Railway*, 55 N. Y. 579, 586. As to tools or materials, the master's duty is performed by furnishing a sufficient, suitable supply. Because it is his duty to furnish tools and materials for his servant, it does not follow that it is his duty to see that a suitable tool or suitable material is used by each servant in each detail of the work. When the master furnishes a sufficient supply of suitable tools or materials, the servant cannot recover for an injury resulting from the selection by another servant of something not suitable for the particular purpose. *Shaw v. Railway*, 73 N. H. —, 58 Atl. 1073; *Manning v. Manchester Mills*, 70 N. H. 582, 49 Atl. 91; *Carroll v. Company*, 160 Mass. 152, 35 N. E. 456; *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. 1057. This results from the principle that the performance of the work is the duty of the servant. *McLaine v. Company*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522. When the master has furnished suitable and sufficient instrumentalities for the work, the duty of personally supervising the use of the instrumentalities cannot reasonably be imposed upon him. To do so would impose upon him, instead of upon the servant, the doing of the work. The master having furnished a suitable supply of competent servants for the work, the selection of the individuals for the details of the work is as much a part of the work as the selection of a particular tool or material.

Upon the evidence it must be found that Carlson was properly employed by the defendant to strike right-handed blows. As there was no evidence the defendant had not furnished left-handed strikers, who might have been used for the particular service required, the use of Carlson (a right-handed striker) by the foreman or the plaintiff to strike left-handed blows cannot differ in principle from the use by either of an unsuitable appliance or material when suitable ones have been furnished. His selection was a mere detail of the general work. It was not an act providing for instrumentalities in carrying on the business, but an act done in the use of the instrumentalities furnished; a subordinate, as distinguished from a supreme or masterful, act. *Wallace v. Railroad*, 72 N. H. 504, 514, 57 Atl. 913. No ground appears upon which the selection and use of an animate instrumentality—a co-servant—for a detail of the work, out of a number of suitable ones supplied by the master, can be logically distinguished from a like selection of inanimate instrumentalities—tools or materials. Hence it must be held that, if the foreman was negligent, his negligence was that of a fellow servant. There being no evidence of negligence in the performance of any duty

Denver & R. G. R. Co. v. Maydole

personal to the master, the defendant's motion should have been granted. The exception to the denial of this motion is sustained.

A verdict for the defendant is ordered upon which there is judgment for the defendant. All concurred.

DENVER & R. G. R. Co. v. MAYDOLE et al.

(Supreme Court of Colorado, Feb. 6, 1905.)

[79 Pac. Rep. 1023.]

Killing of Employee—Comparative Negligence.*—In an action against a master for negligence causing the death of a servant it was error to instruct that, if deceased was guilty of negligence, plaintiff could not recover, unless defendant was so willfully negligent as to show an utter disregard for the life of the deceased, and that the negligence of the deceased was but slight as compared with that of defendant.

Same—Rules Governing Employees—Construction.—In an action against a railroad company for negligence alleged to have caused the death of a servant the construction of a rule prohibiting employees from riding on locomotives was for the court.

Appeal from District Court, Gunnison County; Thereon Stevens, Judge.

Action by Etta M. Maydole and others against the Denver & Rio Grande Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Edw. O. Wolcott, Joel F. Vaile, Thos. C. Browne, and Wm. W. Field, for appellant.

Dexter T. Sapp, for appellees.

STEELE, J. Jesse L. Maydole, an employee of the Denver & Rio Grande Railroad Company, met his death in a wreck on said road which occurred about 2 o'clock in the morning of October 23, 1896. The children of Maydole, who are his surviving heirs, brought suit against the company through their guardian for damages, alleging negligence on the part of the company. Maydole was a brakeman, and at the time of the wreck was riding on the locomotive. The locomotive ran through a burned bridge, and was overturned. The engineer and fireman jumped, but Maydole remained on the locomotive, and was killed. It is claimed by the plaintiff that the fire which consumed the bridge

*For the authorities in this series on the subject of comparative negligence, see *Riley v. Missouri Pac. Ry. Co.* (Neb.), 7 R. R. R. 594, 30 Am. & Eng. R. Cas., N. S., 594 (doctrine not recognized in Missouri); extensive note, 11 Am. & Eng. R. Cas., N. S., 842; *Cicero & Proviso St. R. Co. v. Meixner* (Ill.), 4 Am. & Eng. R. Cas., N. S., 246; *Missouri Pac. Ry. Co. v. Fox* (Neb.), 12 Am. & Eng. R. Cas., N. S., 863; *Southern Ry. Co. v. Watson* (Ga.), 11 Am. & Eng. R. Cas., N. S., 839.

Denver & R. G. R. Co. v. Maydole

came from a defective locomotive; that the company failed to employ track walkers; that Maydole had no knowledge or means of knowing of the unsafe condition of the track. The company alleges that Maydole was guilty of contributory negligence; that he was riding on the locomotive without permission, and contrary to the rules of the company; that he was warned of the danger by the engineer and fireman in time to have saved himself by jumping from the locomotive, and that Maydole's duty as a brakeman required him to remain on the rear car of the train. It was admitted that no track walkers were employed for the purpose of inspecting the track during the night, and that there had been no inspection of the track since the afternoon of the preceding day. The company's rule No. 116 is as follows: "No person will be permitted to ride on engines or in any baggage, mail or express cars, except employees in the discharge of their duties, without a written order from the proper authority." Witnesses testified that a copy of the rule was given Maydole when he entered the employment of the company. It was shown that track walkers had not been employed on the road since 1891, at which time the passenger night trains were discontinued. There was testimony tending to show that Maydole, when he entered the service of the company, knew that the night track walkers were not employed.

The following instructions were given over the objection of the defendant: "Although the jury may believe from the evidence that the defendant, or its servants, were guilty of negligence which contributed to the death in question, still if the jury further finds from the evidence that the deceased was also guilty of negligence which directly contributed to the injury, then the plaintiff cannot recover in this suit, unless the jury further finds from the evidence that the defendant was so willfully negligent as to show an utter disregard for the life of the deceased, and that the negligence of the deceased was but slight, as compared with that of the defendant. The court instructs you that, though you may believe from the evidence that the defendant was guilty of negligence as alleged in the complaint, and that such negligence contributed to the death of the deceased, yet if the jury further believe from the evidence that the deceased was also guilty of an equal, or nearly equal, degree of negligence directly contributing to his death, and without which it could not have occurred, then the jury should find for the defendant." "The jury are the sole judges of whether the rules of the defendant prohibited the deceased from riding on the engine at the time."

These instructions are erroneous, and because of the giving of them the case must be reversed. It has been held several times by this court that an instruction such as that given by the court upon the subject of comparative negligence is erroneous. *D. & R. G. R. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211. The court, and not the jury, should construe the company's rule, and deter-

Pollack v. Pennsylvania R. Co

mine which of its employees the company prohibits from riding upon its locomotives; and, after so determining, should declare the law applicable in an instruction to the jury. The jury should determine whether the deceased had knowledge of the existence of the rule, and also, even though he had such knowledge, whether he had permission from the proper authority to ride upon the locomotive.

We shall not decide at this time that the employment of track walkers for the purpose of inspecting the company's track during a portion of the day is or is not a compliance with the law, nor determine that by accepting employment by the company with knowledge that night track walkers were not employed that Maydole did or did not assume the risk of accident caused by a train running through a bridge that had been burned, but we shall leave these questions for further consideration. For the reasons given, the judgment is reversed, and the cause remanded.

Reversed and remanded.

POLLACK v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Feb. 20, 1905.)

[60 Atl. Rep. 311.]

Railroads—Injury to Trespassing Child—Evidence.*—Where plaintiff, nine years old, a trespasser on a moving freight car, was caused to jump or fall therefrom by threatening motions and calls of the brakemen on the train, and was injured, the question of the negligence of the railroad company was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Stephen Pollack against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John Hampton Barnes, for appellant.

George Demming, for appellee.

ELKIN, J. Joseph Pollack, the plaintiff, a minor, nine years of age, was seriously injured by slipping or falling from a box car in a freight train belonging to defendant company, under the following circumstances: The defendant has its tracks laid on Delaware avenue, in the city of Philadelphia. On the evening of June 27, 1903, a number of box freight cars were standing upon defendant's tracks on said avenue. Joseph Pollack, with four

*See foot-note appended to *Louisville & N. R. Co. v. Logsdon's Adm'r* (Ky.), 12 R. R. R. 637, 35 Am. & Eng. R. Cas., N. S., 637; foot-note appended to *Harris v. Southern Ry. Co.* (Ky.), 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753.

Pollack v. Pennsylvania R. Co

other boys, on the afternoon of that day climbed on the top of these cars, and was playing on and about them. Just a few moments before the injury to the plaintiff occurred, the employees of the defendant company were engaged in coupling the cars, making them up into a freight train. An engine of the defendant moved back toward these cars for the purpose of being connected therewith and hauling the train a short distance away. All of the boys except Joseph saw the engine moving toward the cars, and got off without being injured. Joseph did not see the engine until it was coupled to the cars, and the train had commenced to move away. The boy at this time, being on top of one of the box cars, in order to protect himself, was holding fast to the brake wheel or beam at the end of the car; waiting, as he testified, for the train to stop, so that he could get off in safety. A brakeman who was standing on the ground at the side of the train while it was moving saw the boy, and called aloud twice, saying, "Get out of there." At about the same time another brakeman on top of the moving cars, walking toward the place where the boy was clinging to the brake wheel, called aloud, "Get off there." According to the testimony of the plaintiff, the brakeman on top of the car had a "switch club" in his hand, "and wanted to fire it at me." The boy then became frightened, and, in attempting to climb down the steps of the ladder at the end of the car, slipped and fell on the track, was run over by the train, and suffered severe injuries, for which he seeks to recover damages in this action.

Although the boy was a trespasser, and might have been ejected from the train in a manner which would not endanger his life or injure his body, yet the principle announced in *Enright v. Railroad Co.*, 198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. Rep. 795, rules this case, and justified the court below in submitting the question to the jury to determine whether, under all the circumstances, the defendant was guilty of negligence. In that case it was held that a child of tender years, who, while trespassing on a freight train, is frightened by the shouts and threatening action of a brakeman while in the discharge of his duties, so that he jumps from the train while it is in rapid motion, and is injured, may recover damages from the railroad company for the injuries sustained. In the case at bar, the child being of tender years, and in a perilous position, it was the duty of the brakemen to use the care that reasonable and prudent persons would exercise under the circumstances in attempting to cause him to alight from the moving train. The boy was not injured by reason of the dangerous position in which he had placed himself on top of the cars, but because of the negligent act of the brakeman in causing him to get off while the train was in motion. If the brakemen had not frightened the boy by their calls of "Get off," and by raising the "switch club" in a threatening manner, the boy would have remained in safety, clinging to the brake wheel, until the train stopped, but a short distance away, when

Sheridan v. Baltimore & O. R. Co

he could have gotten off the cars without injury. We do not agree with the learned counsel for the appellant that this case can be distinguished in principle from *Enright v. Railroad Co.*, supra. This case is on all fours with that one, except the train was moving at a less rate of speed. The train, however, was moving at such rate of speed as to make it dangerous for the boy to attempt to get off. This is evidenced by the fact that when he did make the attempt, after being frightened by the brakemen, he was run over by the train, and received the injuries about which he complains. It is true, the boy was a trespasser, and the defendant cannot be charged with any responsibility for accidents which might ordinarily occur to him; nor was it bound to insure his safety in the dangerous position in which he had placed himself. The defendant cannot be held liable in damages in the case at bar unless it clearly appears that its employees, the two brakemen, in causing the boy to jump or fall from the moving car by threatening manner, loud calls, and the flourishing of a switch club, have failed to exercise that prudence and ordinary care which the instincts of humanity and rules of law require in dealing with a child of tender years. The learned trial judge submitted the facts to the jury to determine whether the boy did fall or jump from a moving train because of the action or threatening manner and loud calls of the brakemen. Under the authority of our cases, there was no error in so doing.

Assignments of error overruled and judgment affirmed.

SHERIDAN v. BALTIMORE & O. R. Co.

(Court of Appeals of Maryland, March 23, 1905.)

[60 Atl. Rep. 280.]

Railroads—Negligence—Contributory Negligence—Question for Jury.*—In an action for injuries sustained by plaintiff, owing to the starting of a train while he was attempting to cross by getting upon the bumpers between cars on a statement of brakeman that there was plenty of time, the question of contributory negligence held one for the jury.

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Action by Thomas Sheridan against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

*See extensive note, 2 R. R. R. 342, 25 Am. & Eng. R. Cas., N. S., 342; extensive note 6 R. R. R. 325, 29 Am. & Eng. R. Cas., N. S., 325; foot-note appended to *Russel v. Central of Georgia Ry. Co. (Ga.)*, 12 R. R. R. 310, 35 Am. & Eng. R. Cas., N. S., 310.

Sheridan v. Baltimore & O. R. Co

Joshua Horner, Jr., and Isaac Lobe Straus, for appellant.

Duncan K. Brent and W. Irvine Cross, for appellee.

SCHMUCKER, J. The appellant sued the appellee in the court of common pleas of Baltimore City for damages for crushing his foot between two cars of a freight train. In the trial of the case below, the court, at the close of the plaintiff's evidence, granted the defendant's prayer directing the jury to render a verdict in its favor because of contributory negligence on the part of the plaintiff. From the judgment entered on the verdict so rendered, the plaintiff appealed.

There is but one bill of exceptions in the record, and that is based upon the court's action in granting the prayer holding that the undisputed evidence showed that the plaintiff had been guilty of negligence directly contributing to cause the injury complained of.

The accident happened at or near the point where the appellee's branch line of railroad from Baltimore City to Locust Point crosses Barney street. This crossing is on a curve in the railroad track, and about the middle of a stiff up grade, on which almost every long freight train becomes stalled, and is compelled to wait for the assistance of a helping engine. These stalled freight trains currently block the street crossings on the grade for from 10 minutes to an hour or more at a time. The helping engine usually comes up behind the train, and assists by pushing it. It has long been the custom for the helping engine to blow its whistle as a signal as it approaches the rear of the train, which is answered by a blast from the whistle on the engine at the head of the train. Both of these signals are given before the train moves. This state of affairs has continued for 18 or 20 years. The land lying southwest of the railroad is occupied mainly by factories and similar industrial establishments, whose operatives and employees largely reside on the other side of the road, where the improvements are almost exclusively dwelling houses. Many of these employees daily cross the railroad tracks at Barney street in going back and forth between their houses and the factories. For 18 or 20 years it has been the custom of these employees, when a freight train is stalled on the track at the crossing, to cross through the train by jumping over between the cars, or crawling underneath them, without, so far as the evidence shows, any objection or protest on the part of the persons in charge of the train. At times 50 or more of the men working in the factories were seen to go through standing trains at the crossing in that manner in a single day. At noon of the 29th of December, 1902, the appellant, who was employed at the Thompson Chemical Works, on the south of the railroad, started to go along Barney street to his residence, which was north of the track, for his dinner. When he reached the track he found a long freight train stalled there. Not desiring to cross the train, he walked alongside the track to Hanover street, which was quite a thoroughfare, hoping to get through there, but he found

Sheridan v. Baltimore & O. R. Co

that street also blocked by the train. He then returned to Barney street, where he met one of the brakemen of the train, who told him to jump over it; but he crawled underneath the cars, and crossed in that way. On his return from dinner, toward the factory, he went first to Hanover street, and found the train still standing across it. He then walked down toward Barney street, near which he met the same brakeman, who again told him to cross the train. The appellant hesitated to cross, when the brakeman told him he had plenty of time, and further said that when they got help they had to give a signal to the engine ahead before starting the train; adding, "We can't leave here until we get a helper, and probably we will be here an hour." The appellant thereupon took hold of two cars, and attempted to get upon the bumpers between them, so as to cross over the train; but just as he got his foot upon the bumper the train started without signal or warning, and crushed his foot between the bumper and the car so badly that it had to be amputated.

The appellee admits the negligence of its own servants, by requesting the court to instruct the jury that the appellant was guilty of contributory negligence. The only question that we are called on to determine is whether the appellant's own conduct at the time of the accident to him was such as to justify the court below in holding, as a matter of law, that he was guilty of contributory negligence. This question can be correctly answered only in the light of the special and somewhat unusual facts of the case. The appellant was not a passenger, and was therefore not entitled to the exercise by the appellee of the highest degree of care and diligence in his behalf. Nor was he a mere trespasser, to whom the appellee owed only the duty of abstaining from wantonly and willfully injuring him. If we admit that it was beyond the scope of the brakeman's employment to bind the appellee by the express invitation to cross the train which he gave to the appellant at the time of the accident, we cannot close our eyes to the fact that for many years the appellee had acquiesced, without objection, in the habit of the men working in the factories in that vicinity of crossing between or under its stalled trains, which impeded their passage to and from their daily labor. Under somewhat similar circumstances, we said in *Siacik's Adm'r v. N. C. R. Co.*, 92 Md. 219, 48 Atl. 149, that the railroad company's "servants might have known, from experience and ordinary observation of the blockading of streets by railway cars, that some people would likely climb over, between, or, if small enough, under, the cars, in order to cross the street." A jury might conclude that this conduct of the appellee in the present case, in so long permitting the crossing of its stalled trains, amounted to an implied assent or invitation to the appellant to cross between the cars of the train which on the day of the accident for so long a time closed the passage from his home to his place of labor. If so, the appellee was bound to exercise reasonable care to protect him in accomplishing the crossing

Sheridan v. Baltimore & O. R. Co

which he was, with its consent, attempting to make. *Swift v. Staten Island R. T. Co.*, 123 N. Y. 650, 25 N. E. 378; *Taylor v. Del. & Hud. Canal Co.*, 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446; *C. B. & Q. R. Co. v. Murowski*, 179 Ill. 77, 53 N. E. 572; *Clampit v. Chicago, St. P. & K. C. Ry. Co.*, 84 Iowa, 71, 50 N. W. 673.

The appellant does not appear to have attempted to make the crossing in a negligent manner. To cross over the bumpers between two freight cars, when at rest, is not necessarily a dangerous operation. The peril of the situation arises from the danger of the cars starting before the crossing is completed. In the present case the appellant used reasonable care to ascertain when the train would start, by making inquiry of one of the brakemen in charge of it, who informed him that it would remain for some time longer, until a helping engine came, which would signal its approach by blowing its whistle. Assuming that the appellant had the implied assent of the appellee to make this crossing, we do not think it can be said, as a matter of law, that he was guilty of contributory negligence in attempting to make it in the manner appearing from the evidence.

We have repeatedly held that negligence, direct or contributory, is ordinarily a question for the jury, who must solve it by a consideration of the facts of the case before them. In *Cooke v. Traction Co.*, 80 Md. 551, 31 Atl. 327, we said: "Negligence is essentially relative and comparative, not absolute. It is not even an object of simple apprehension, apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other, under different surroundings, they inevitably change their original signification and import. * * * The existence of negligence is therefore to be sought in the facts and surroundings of each particular case. * * * Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law. *Fitzpatrick's Case*, 35 Md. 32; *Dougherty's Case*, 36 Md. 366; *Miller's Case*, 29 Md. 252, 96 Am. Dec. 528," etc.

We do not think that the present case should be controlled by the authorities relied on by the appellee in support of the proposition that a person who voluntarily takes an exposed position upon a train not designed for passengers assumes the special risks of that position, even if he takes it by the express or implied permission of the conductor. The long course of conduct of the appellee in dealing with those whose necessities require them to cross a track on which its freight trains are frequently stalled for a considerable time makes the present case one whose circumstances should be considered and passed upon by the jury, in

Texas Cent. R. Co. v. Harbison

determining whether the appellant was guilty of contributory negligence when he was injured.

The court below erred in taking the case from the jury, and for that error the judgment must be reversed.

Judgment reversed, with costs, and new trial awarded.

TEXAS CENT. R. CO. v. HARBISON.

(Supreme Court of Texas, March 20, 1905.)

[85 S. W. Rep. 1138.]

Railroads—Negligence—Insufficiently Lighted Depot Grounds—Injury to Expressman.*—Where a railroad company had given an express company permission to store its packages in the baggage room of a depot, and the express company's deliveryman was storing packages intended for shipment in the room in the evening, at a time when no express train was due for several hours, the railroad company was not liable for an injury received by him, owing to its failure to light the depot or grounds; it owing him no such duty.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by F. H. Harbison against the Texas Central Railroad Company. Judgment in favor of plaintiff, and defendant brings error. Reversed.

Clark & Bolinger and *W. E. Conner*, for plaintiff in error.

Scott & Brelsford, *W. B. Patterson*, and *D. G. Hunt*, for defendant in error.

BROWN, J. The honorable Court of Civil Appeals did not file conclusions of fact in this case, and we are under the necessity of resorting to the statement of facts in order to determine the question presented by this application. Giving to the evidence the construction which would support the judgment of the court, we find that the following facts were proved by the plaintiff. At Cisco, Tex., the Texas & Pacific Railroad and the Texas Central Railroad intersect; the former running practically east and west, and the latter north and south. On the south side of the Texas & Pacific track, and west of the intersection, a switch track leaves the Texas & Pacific main track running east and south to a connection with the Texas Central main track at a point south of the intersection, thus forming a triangular space between the two main tracks and switch. Within this space was located the depot building for both of the roads, and a small park, which was inclosed by posts and iron railing. The only approach for vehicles to the depot from the town was by crossing the switch track

*See foot-note appended to *Kendall v. Louisville & N. R. Co.* (Ky.), 11 R. R. R. 771, 34 Am. & Eng. R. Cas., N. S., 771; foot-notes appended to *Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725.

Texas Cent. R. Co. v. Harbison

and entering the triangular space, and all wagons and carriages going to the depot crossed the switch at this point. Many people in wagons and carriages and on foot passed over this ground both in the day and night time. Each of the railroads carried express matter for the Pacific Express Company, and the agent of the Texas Central Company had given that express company permission to deposit its freight and packages in the baggage room of the depot; a key being furnished to Harbison, who was the deliveryman of the express company. It was Harbison's duty, as deliveryman, to gather up the express matter which was to be shipped out of the city, transport it to the depot, and deliver it to the railroad company, and to receive such freight or matter as was brought by the express company to the city, and to deliver the same to the consignees. On the day when the injury occurred to Harbison, he was engaged in his regular employment of hauling freight for the Pacific Express Company to the depot, to be delivered to each of the said railroads; and about 7 p. m., after dark, he drove his wagon loaded with express matter, in the usual way, across the switch into the angle, and was unloading his freight, when he saw the reflection of a light which attracted his attention, and, going to his team, he discovered that his horse was frightened, and he seized the bit, attempting to lead the horse across the switch, so as to get out of the way of the approaching engine. Before he cleared the switch, a locomotive which belonged to the Texas Central Railroad, going from the west to the east, struck his wagon and demolished it, crippled the horse, and seriously injured Harbison. There was no bell ringing upon the locomotive, nor was the whistle blown at any time. The headlight upon the locomotive was very dim, so that an object could not be seen more than 20 feet from the head of the locomotive. There was no light in the depot building, or upon any part of the depot grounds, so as to light the place where Harbison was. There was no express train due on either road at that hour. Two trains were due to pass on the Texas & Pacific during the night—one going east, and the other west—but the time at which they were due is not shown by the testimony. An express train was due to arrive on the Texas Central Railroad at 10 p. m., and to leave at 6 a. m. Among other things, the court charged the jury as follows: "If you find from the evidence that the defendant at the time of the plaintiff's injuries had no light to light up its depot grounds, and had no good and sufficient headlight on its locomotive, and that said failure to light said depot grounds, or failure to have good and sufficient headlights on its locomotives, were acts of negligence on the part of defendant, and that said negligence, if any, was the proximate cause of the plaintiff's injuries; and if you further find from the evidence that the plaintiff was not himself guilty of negligence which proximately contributed to the cause of his injuries—then you will find for the plaintiff," etc. The jury returned a verdict in favor of the plaintiff, Harbison, upon which the trial court en-

Coffee v. Pere Marquette R. Co

tered a judgment, which was affirmed by the Court of Civil Appeals.

Harbison was not in the employ of the Texas Central Railroad Company at the time he was injured; neither had the railroad company made any contract with him to furnish a light upon its depot grounds, to enable him to perform his work for the express company. The time at which Harbison was injured was not such as he was authorized to go to the depot to transact business with the railroad company. On the contrary, no train was due at that hour, nor, according to the testimony, for several hours thereafter, but the defendant in error was, by permission of the railroad company, and for his own accommodation, engaged in storing freight and express packages to await the arrival of the trains. The facts of this case do not show that the plaintiff in error was under any obligation to Harbison to light its ground or depot at that hour; hence a failure to furnish such light could give no right of action to Harbison, although his injuries may have resulted from a want of light at the time and place. *Railway Co. v. Ryon*, 70 Tex. 58, 7 S. W. 687; 1 Shear. & Red. Neg. § 8. The author cited, defining "negligence," says: "The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owed a duty, but did not owe it to the plaintiff, the action will not lie."

There are many other questions presented by the application, but, for want of a finding of the facts by the Court of Civil Appeals, we are unable to pass upon them.

The trial court erred in giving the charge quoted, and the Court of Civil Appeals erred in affirming the judgment of the district court, for which errors the judgments of the district court and of the Court of Civil Appeals are reversed, and the cause remanded.

COFFEE *v.* PERE MARQUETTE R. CO.

(Supreme Court of Michigan, March 21, 1905.)

[102 N. W. Rep. 953.]

Accident at Crossing—Contributory Negligence—Obstructed View—Reliance on Assurance of Bystander.*—Where, in an action for injuries at a railroad crossing, plaintiff heard the puffing of an engine before he started across the track, but, his view being obscured, he was advised by another that the puffing he heard proceeded from an engine on another track, whereupon plaintiff started to cross, he was not guilty of contributory negligence, as a matter of law, in not waiting until certain that the puffing was not from an engine approaching on defendant's track.

Same—Same—Same.—Where plaintiff, approaching a railroad crossing where his view was entirely obstructed, stopped, when only

*As to the care required of a traveler at a crossing where the view is obstructed, see foot-note appended to *Chicago, etc., Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584.

Coffee v. Pere Marquette R. Co

30 feet from the track, until satisfied that it was safe to proceed, he was not guilty of contributory negligence, as a matter of law, in not stopping again, in addition to continuously listening, before driving on the track.

Same—Same—Same—Failure of Bystanders to Warn.—Where plaintiff's view of a railroad crossing was entirely obstructed by a cold storage building and a freight car, and, as he was about to cross the track, other men were standing in front of him, who were in a position to have seen the approaching engine by which plaintiff was struck, but they said nothing to warn plaintiff of his danger, he was not guilty of contributory negligence, as a matter of law, in failing to ask such persons whether it was safe to cross the track.

Error to Circuit Court, Kent County; Alfred Wolcott, Judge.

Action by John Coffee against the Pere Marquette Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Argued before MOORE, C. J., and CARPENTER, MCALVAY, GRANT, and BLAIR, JJ.

Frederick W. Stevens (Charles McPherson, of counsel), for appellant.

Ward & Brown, for appellee.

CARPENTER, J. Plaintiff received serious injuries as the result of a collision between his wagon and defendant's locomotive. He brought this suit and recovered a judgment in the court below. Defendant asks us to reverse that judgment on this single ground, viz., that the trial court erred in not directing a verdict on the ground of plaintiff's contributory negligence.

The facts are these: September 18, 1901, plaintiff delivered a load of freight at Metzger's cold storage building, in the city of Grand Rapids, situated just west of Winter street. In driving from that building to Winter street, plaintiff had to cross two tracks of defendant, viz., a siding and a main track. The main track was situated within the limits of Winter street. While crossing the latter track, the collision which occasioned his injury occurred. In approaching said main track, plaintiff had to pass between two freight cars on said siding, situated about 10 feet apart. The cold storage building and the freight car on his north entirely obstructed plaintiff's vision, and prevented his seeing the approaching locomotive, which was coming from the north, until he reached the main track. When plaintiff was about 30 feet from defendant's track, he thought he heard the puffing of an engine. He stopped opposite the door of the cold storage warehouse to investigate. The noise ceased, and he was assured by Mr. Lemstra, an employee of the cold storage company, whose experience about railroads was, but whose opportunity for observation was not, superior to his own, that the engine was on another track, and that there was no danger. He started on, listening as he proceeded, and met an acquaintance—a Mr. O'Leary—who had just walked across defendant's track without seeing the approaching engine. Plaintiff merely said, "Good

Coffee v. Pere Marquette R. Co

morning," and passed on, confirmed in his belief that the passage was safe. When nearer defendant's track, plaintiff saw some persons standing in front of him on Winter street. These men were in such a position that they could have seen the approaching engine. They said nothing to plaintiff, and he made no inquiries of them, but their silence confirmed his belief that it was safe to cross. Passing on, he did not observe the locomotive which injured him until his horses were on the main track.

Defendant contends that plaintiff was, as a matter of law, guilty of contributory negligence, for three reasons: First, "After hearing the engine puffing, he should have waited long enough to make sure that it was not approaching on defendant's track." Second. He should have stopped, as well as listened, in moving from this point to the place where the collision occurred. Third: "Plaintiff should have inquired of the persons he saw in Winter street, whose view of the approaching train was unobstructed, to learn if he might safely drive across the track." We will consider each of these reasons.

1. Defendant's contention that plaintiff, after hearing the engine puffing, should have waited until certain that it was not approaching on defendant's track, assumes that the puffing heard by plaintiff proceeded from the engine which occasioned his injury. The record, which the trial judge certifies "contains all the testimony given upon said trial which in any manner affects the exceptions therein noted," contains no positive testimony tending to prove that assumption. While the jury might have inferred that the puffing heard by plaintiff proceeded from the engine which collided with him, that inference was by no means a necessary one. They might have believed, as Lemstra induced plaintiff to believe, that this puffing proceeded from an engine on another road. Since, for the purposes of this question, we must adopt that view of the facts most favorable to plaintiff, we cannot assume that this puffing proceeded from the engine which later collided with his wagon. This disposes of defendant's claim under present consideration, for surely no one will claim that plaintiff was negligent in crossing defendant's track because an engine was moving on an altogether different track.

2. When plaintiff was only 30 feet away from defendant's track, he stopped until satisfied that it was safe to proceed. Defendant's contention that, as he approached the track, plaintiff was bound to stop again, as well as to listen, finds support in no decision of this court. We cannot say, as a matter of law, that a reasonably prudent man, with nothing to excite his apprehension, would not have relied, as plaintiff did, on his sense of hearing. Whether or not he should have stopped again was a question properly submitted to the jury. See *Guggenheim v. L. S. & M. S. Ry. Co.*, 66 Mich. 150, 33 N. W. 161.

3. Neither do we think that plaintiff was negligent because he did not ask the men standing on the opposite side of the track whether it was safe to cross. An ordinarily prudent person might

St. Louis, etc., Ry. Co. v. Johnson

assume, as it is to be inferred from his testimony plaintiff did assume, that, if those men knew he was putting himself directly in the path of a rapidly moving locomotive, the instinct common to humanity would lead them to warn him of his danger. We conclude, therefore, that the court did not err in leaving the question of plaintiff's contributory negligence to the jury.

Judgment is affirmed, with costs.

ST. LOUIS, I. M. & S. RY. CO. v. JOHNSON.

(Supreme Court of Arkansas, March 4, 1905.)

[86 S. W. Rep. 282.]

Accident at Crossing—Negligence—Backing Train—Lights—Lookouts.*—Evidence that a railroad backed a freight train along a side track in a town at dusk without any lights or switchmen on the rear car to give signals or warning is sufficient to show negligence.

Same—Care Required of Pedestrians.†—A person about to cross a railroad track is bound not only to look and listen, but to continue to use his eyes and ears until he has completed the crossing and passed out of danger.

Same—Contributory Negligence—Question for Jury.—Whether one crossing a side track of a railroad at dusk, and who was struck by a backing freight train unprovided with lights, and failing to give warning of its approach, looked and listened sufficiently, and should have seen or heard the train, or not, held, under the evidence, a question for the jury.

Appeal from Circuit Court, Nevada County; Joel D. Conway, Judge.

Action by R. B. Johnson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On November 20, 1901, at Boughton, Ark., the appellee, Johnson, was struck by a moving train of the appellant railroad company, and, in consequence of his injury therefrom, his right foot had to be amputated. He sued the company, charging negligence. It denied the negligence, and charged contributory negligence. The trial resulted in a verdict for \$1,500, and the rail-

*As to the duty to maintain lookouts upon trains approaching crossings, see foot-notes appended to Louisville & N. R. Co. v. Dick (Ky.), 12 R. R. R. 314, 35 Am. & Eng. R. Cas., N. S., 314, where all the preceding authorities in this series are collected.

†For the authorities in this series on the subject of the care required before attempting to cross railroad tracks, see foot-note appended to Confer v. Pennsylvania R. Co. (Pa.), 13 R. R. R. 429, 36 Am. & Eng. R. Cas., N. S., 429 (at crossing where view is obstructed). See foot-note appended to Cromley v. Pennsylvania R. Co. (Pa.), 12 R. R. R. 666, 35 Am. & Eng. R. Cas., N. S., 666; foot-note appended to Louisville & N. R. Co. v. Satterwhite (Tenn.), 13 R. R. R. 296, 35 Am. & Eng. R. Cas., N. S., 296; Mease v. United Traction Co. (Pa.), 12 R. R. R. 272, 35 Am. & Eng. R. Cas., N. S., 272.

St. Louis, etc., Ry. Co. v. Johnson

way company appealed. Johnson was engaged in the mercantile business, having a store on the southeast side of the railroad track and right of way which ran through the village of Boughton. On the evening in question, Johnson, having business with some of the train crew on a passenger train known as "No. 53," went from his place of business along a well-beaten and commonly used pathway to the depot. This path crossed the side track and main track of appellant's road. In order to let the "Cannon Ball" train pass, the passenger train No. 53 and a work train went into the side track. About the time Johnson started, No. 53 was backing out of the side track, and coming back to the station on the main track. The work train consisted of an engine, tender, and two water cars. It was in the side track south of No. 53 when it was on that track. When No. 53 backed out north to get into the main track, where it would go south to the station, the work train also backed out north. This put the rear water car as the front of the moving train. The appellee's testimony tended to show that there was no light or switchman on this forward car, and that this train gave no starting or other signals while backing out of the switch up to the time it struck Johnson. The following extracts are taken from Johnson's account of the occurrence: "Q. Was it night? A. Yes, sir. Just as I got across the switch, save by the right foot, I was struck by the train, and didn't know any more. Q. Did you make any observation, in the way of looking and listening? A. I certainly did. I certainly did. Q. You say you were looking and listening for trains? A. Yes, sir; that is one thing I always done. I always peeled my eyes and picked my ears when I was there. Q. You regarded that as a dangerous place? A. I certainly did. I certainly did. Q. You didn't see the train that struck you? A. No, sir; no sir; no sir." On cross-examination he said: "Q. Which way did you look when you started to go across the track? A. It seems to me I looked. I tried to look every way. Q. What did you do after you started to go across the track? A. I looked with all the eyes I had. Q. Which way did you look? A. I think I looked up and down the track, both. Q. What did you see? A. I saw No. 53. Q. Where was No. 53? A. Standing on the main track; just about standing. It might have been moving a little. Q. How far from that were you? A. When I got struck I was just in the act of heaving this foot over the rail. Q. How far was No. 53 from you when you crossed the track? A. It was about the width of the tracks between the switch and main track." He did not see the work train when it went in the switch or side track, and did not see it on the side track at any time. He denied that he was watching No. 53, and did not on that account fail to look towards the work train, and denied that he stopped on or about the track. "Q. When was the last time you looked to your left (in the direction of the work train) as you started onto that track? A. It must have been just as I entered the track. It seemed to be like I always did look. Q. We want to know what

St. Louis, etc., Ry. Co. v. Johnson

you did that night, not what you always do. Did you look in this direction—to your left—as you went onto the track? A. I wouldn't be positive about that, but I know I had my eyes open. Q. As a matter of fact, you don't have any clear recollection of what you did do? A. Yes, sir; I recollect going out there, but after the train struck me I don't remember. Q. You don't remember what took place before you stepped on the track? A. No, sir. Q. You don't have any recollection of seeing the train? A. No, sir. Q. You had your eyes, and you think you must have looked? A. Yes, sir; I always did look. Q. You have no clear recollection of looking on that night? A. No, sir; only I know I went over there with that understanding always. Q. But you have no recollection, now, of looking that night? A. No, sir; not more than I generally do." These excerpts present the crucial questions in his case, and they represent fairly his testimony as a whole. Sutton, a witness for plaintiff, on cross-examination stated that at the time of the injury to Johnson it was not full dark—just dusk; that the outline of objects could be seen, but not so plainly as in daylight. He thought it light enough to see an object of the size of the car that struck Johnson at a distance of 50 feet. The trains were lighted, and the trainmen carrying lanterns. Graham, a witness for the railway company, was with Johnson when he was hurt, and barely escaped himself. He was just ahead of Johnson in crossing. The work train was about 50 feet from him when he crossed, and moving towards him, and he says the train was in 30 feet of Johnson when he went on the track, and the reason he did not get across safely was because he stood still and looked the other way—a statement denied by Johnson. The witnesses for defendant testified that there was a brakeman on the forward end of the car which struck Johnson, with a lantern. Other witnesses said it was nighttime, and gave different descriptions as to how well objects could be discerned. One witness testified that the brakeman was in the middle of the water car with a lantern. Without going into further detail, the foregoing statement develops sufficiently the issues which were submitted to the jury.

B. S. Johnson, for appellant.

J. O. A. Bush, for appellee.

HILL, C. J. (after stating the facts). The instructions present no prejudicial errors. The court practically gave all the instructions requested by the appellant, covering every phase of its case which it desired submitted to the jury. There was abundant evidence of the negligent operation of the train to submit that question to the jury, and, as it was done under proper instructions, it must be taken here that the company negligently failed to keep a lookout and give warning of its movements.

The case then hinges upon the question whether the uncontradicted testimony develops that he was guilty of contributory negligence, requiring the case to be withdrawn from the jury.

St. Louis, etc., Ry. Co. v. Johnson

In *Ry. v. Crabtree*, 69 Ark. 134, 62 S. W. '64, this court pointed out that the duty of a person about to cross the railroad track was not only to look and listen, but to continue on guard and continue to use his eyes and ears until the track and danger was passed. The court submitted this question fully to the jury, instructing them to find against Johnson unless he fully met this requirement. The instructions requested by the appellant on that subject were given, and they did not lack fullness or emphasis. It is contended that on cross-examination Johnson modified his former statements as to looking and listening, but the change is more in expression than in reality. Even if the cross-examination weakened the force of his statements, still the whole matter was a question for the jury, and it has been resolved against the appellant on legally sufficient evidence.

The more serious question is Johnson's failure to see the train. The requirement to be constantly on guard in crossing the track is not met by looking and failing to see what is plain to be seen. If this had occurred in broad daylight, it is clear that his failure to see what could have been seen by vigilance would have defeated him. His testimony shows it was night. Other testimony puts it in that uncertain light when more the outline than the substance of objects is discernible. The leading case on this subject is *Railroad v. Houston*, 95 U. S. 697, 24 L. Ed. 542. Mr. Justice Field, speaking for the Supreme Court of the United States, said: "Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." It cannot be said here that Johnson could not have failed both to see and hear the train which was coming. It omitted lights and signals and warnings of its approach. Moving slowly, and another train near by also moving, would probably prevent the noise of its movements attracting attention. The forward car was a flat car, with a water tank set back on it, and, in the half light, would not necessarily be seen to be moving, if seen at all. The fact, if a fact (and there was testimony to that effect), that there was a brakeman with a lantern well back on the car, and about where the tank was, might tend, in the dim light, to deceive the eye as to whether it was a car. These questions all went to the jury under instructions as favorable to appellant as it asked, and it cannot be said the verdict was without evidence to support it. A decision of the Eighth Circuit Court of Appeals (*Ry. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112) is relied upon as authority requiring the withdrawal of this case from the jury. The case does not support the contention. After stating the rules similar to the announcements of them in the *Crabtree* and *Houston* Cases, the court said: "The application of these principles to the case at bar demonstrates, we think, that it should have been withdrawn from the jury, inasmuch as it was clearly shown, and

St. Louis Southwestern Ry. Co. v. Purcell

not denied, that for more than 200 yards before the plaintiff reached the crossing he was in plain view of the approaching train, and could have seen it by making the slightest exertion." It cannot be said, under the evidence, that the approaching train was in plain view, and a question of fact was presented, which was properly submitted to the jury.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. PURCELL

(Circuit Court of Appeals, Fifth Circuit, February 15, 1905.)

[135 Fed. Rep. 499.]

Bill of Exceptions—Grounds for Striking Out—Incorporating Evidence Taken by Private Stenographer.—Where the evidence in a case is embodied in bills of exceptions duly allowed and certified by the trial judge, the fact that the testimony was not taken down by order of the court or by consent, but by a stenographer employed by one of the parties, is immaterial, and is not ground for striking it from the record.

Railroads—Injury to Person on Track—Contributory Negligence.—A person who in the daytime, after walking for a distance beside a railroad track, stepped upon the track to cross a cattle guard, and, after crossing, but while still on the track, was struck and injured by a train coming from behind her, which could have been seen approaching for a distance of 300 yards, was guilty of contributory negligence which precludes a recovery for the injury, notwithstanding her testimony that before stepping on the track she looked and listened for a train and saw or heard none, where, as clearly shown by all the other evidence, the train was then within plain sight.

Same—Negligence.*—A railroad company is not chargeable with negligence which renders it liable for the injury of a woman struck by a train, where the customary and required signals were given, and, when the woman was seen by the engineer and fireman, she was walking beside the track at a safe distance, and after she stepped upon the track all possible was done to stop the train before it reached her.

Husband and Wife—Right of Action for Injury of Wife—Louisiana Statutes.—Act No. 68, p. 95, Laws La. 1902, amending Rev. Civ. Code 1870, § 2402, by providing that "damages resulting from personal injuries to the wife shall not form part of this community but shall always be and remain the separate property of the wife and recoverable by herself alone," is not retroactive, and did not affect

*As to the right of those in charge of trains or cars to assume that persons on or near tracks will avoid danger, see foot-note appended to *Simpson v. Rhode Island Co. (R. I.)*, 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

As to the care due licensees and trespassers on railroad tracks, see *Maysville & B. S. R. Co. v. McCabe (Ky.)*, 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co. (Ind.)*, 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; *Rawitzer v. St. Paul City Ry. Co. (Minn.)*, 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Hortenstine v. Virginia-Carolina Ry. Co. (Va.)*, 12 R. R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616; *Gregory v. Louisville & N. R. Co. (Ky.)*, 12 R. R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293; *Koegel v. Missouri Pac. Ry. Co. (Mo.)*, 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358.

St. Louis Southwestern Ry. Co. v. Purcell

a right of action for an injury to a wife which had become fully vested in her husband prior to its passage.

In Error to the Circuit Court of the United States for the Western District of Louisiana.

The defendant in error filed this suit June 24, 1902, in the Second Judicial District Court of Bossier Parish, state of Louisiana, charging that the plaintiff in error (defendant below) was a corporation organized under the laws of the state of Missouri, and owned and operated a line of road through said parish of Bossier, and that on its line near Bolinger is a heavy grade; that on March 21, 1902, his wife, in going over to Bolinger, passed along a pathway through his field until she came to the railroad track, about 400 feet "from which point she walked along the pathway by the side of the track toward Bolinger until she reached the cattle guard, where she stopped, looked, and listened for a train, and, not hearing or seeing any, she walked along the track constantly used by pedestrians, with the knowledge and acquiescence of defendant company, and crossed over the cattle guard, and just as she reached the opposite side a freight train coming from the south, and without any signals whatever, struck and knocked her 20 or 30 feet, throwing her violently upon the ground, breaking her collar bone," etc. He further charged "that his said wife was without fault, and that her injuries were due solely to the fault of the defendant company in not maintaining a lookout from said train, which was rushing into a populous village, and in the failure to sound the signal for the crossings and the stations, and as warning of danger." He asked for damages in the sum of \$6,200. On proper petition and bond, the case was removed by the defendant below to the United States Circuit Court for the Western District of Louisiana. The defendant below, by exception and answer, denied that the complaint set forth any cause of action or right in the plaintiff to bring suit. It denied that the injury to plaintiff's wife was caused by any negligence on its part, and charged that whatever injury she sustained was caused solely by her own negligence. It charged that she was a trespasser on its track, and her presence there was unknown to its servants in time to prevent the accident. After filing its answer, and before the case was tried, the plaintiff in error filed a plea in bar of his right to recover, and charged that he was without right to stand in judgment for, and without authority to sue for, the personal injuries done to his wife, under the laws of Louisiana, and she alone could stand in judgment for such injuries. This exception was tried and overruled, and the railway company duly excepted to the ruling of the court thereon. Thereafter Mrs. Purcell, the wife, appeared in the case, and averred that since the institution of the suit the Legislature of Louisiana had adopted Act No. 68, p. 95, of 1902, which limited the right of a married woman to sue for personal injuries received by her to her alone, and she asked to be permitted to intervene in the suit and substitute her own name as plaintiff in

St. Louis Southwestern Ry. Co. v. Purcell

the case. Thereupon the defendant below filed a plea of prescription of one year in bar of her right to recover, the accident having happened in March, 1902, and no suit having been brought by her until October 21, 1903. This plea of prescription was overruled by the court, to which ruling the plaintiff in error here duly excepted. The case was twice tried by a jury in the lower court, the first verdict being for one cent, and the last one for the sum of \$3,000. During the trial of the case, J. S. Purcell, the plaintiff and the husband of the injured party, was called as a witness, and gave material testimony in the case. Before he was sworn, counsel for the defendant below objected to his being sworn or testifying, on the ground that he was the husband of Mrs. Purcell, the injured party, and to whom the damages in the case are due, if any, on the ground that the husband could not be a witness for or against his wife under the laws of Louisiana. During the trial the defendant below called as a witness in its behalf John Crocker, who, having testified with reference to the written statement made to him soon after the accident by Mrs. Purcell and witnessed by her husband, stating how the accident occurred, and being unable from the lapse of time to state substantially what she said to him, but having stated that he took down the written statement as dictated to him by her, counsel for the railway company offered in evidence the paper, and asked for permission for the witness to read the paper in order to refresh his memory, all of which was refused by the court, and to which ruling a formal bill of exception was taken. After all the evidence was taken, counsel for the railroad company asked the court to direct a verdict for the defendant on all the evidence, which the court refused. The charge of the judge to the jury as given was duly excepted to in several particulars, but, in the view taken of the case, it is not necessary to specify. The assignment of errors covers all the questions raised on the trial. Defendant in error moves this court to strike out from the record all the purported written testimony included therein, for the reason that it was not taken by consent of parties nor by order of the court, but was taken by the stenographer employed by plaintiff in error for his own private use and benefit.

J. D. Wilkinson, for plaintiff in error.

A. J. Murff, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The motion to strike out the evidence in the record cannot prevail, because it is all found in bills of exception duly certified by the trial judge. Whether it was taken from the notes of a private or official stenographer or from the judge's own notes seems to be immaterial.

On the undisputed facts in the case, the railroad company was not in fault in regard to the injuries to Mrs. Purcell. When first seen by the engineer and fireman, Mrs. Purcell was approaching

St. Louis Southwestern Ry. Co. v. Purcell

the railroad right of way, afterwards walking along the side of the track in "a pleasant, comfortable path," as described by herself. The engineer had given the usual and customary signals for stopping the train at Bolinger, near by, and the fireman was ringing the bell. Up to the time Mrs. Purcell went on the track to cross the cattle guard, the engineer and fireman had every reason to believe that, so far as the train was concerned, she would remain in a place of safety, and not venture on the track in front of the approaching train, and were therefore not required to either stop the train or give signals to prevent such trespass. See *Matthews v. Atlantic & N. C. R. Co.* (N. C.) 23 S. E. 177. As soon as she entered on the track to cross the cattle guard, both engineer and fireman resorted to all means in their power to stop the train and prevent injury.

On the evidence of Mrs. Purcell herself, it is difficult to acquit her of contributing to her own injury. She testified as follows:

"Q. You were hurt by one of the trains of the St. Louis Southwestern Railroad near Bolinger? A. Yes, sir. Q. When was that, do you remember? A. It was on the 21st day of March two years ago—the 21st of this month. Q. Mrs. Purcell, where were you going that morning? A. I was going to Bolinger. Q. What time of day was it? A. I do not know exactly. Q. Just estimate the time of day. About what time was it? A. It was somewhere between 9 and 11 o'clock. Q. In going down to Bolinger, which way were you in the habit of going? A. I always went just as I went that morning. Q. How were you going down—through the field? A. Yes, sir. Q. What other way was there to go to Bolinger? A. Not any other way except around the public road. Q. In going on the public road, you would have had to have gone through a considerable skirt of woods? A. Yes, sir; and it was further from our house to the public road than it was to the track. Q. Then it was a good deal further to go the public road than it was this way? A. Yes, sir; never went around the public road only in a vehicle. Q. Went the way you were going that morning? A. Yes, sir. Q. Your daughters were at Bolinger? A. Yes, sir; husband and daughter. I was not on the way to the boarding house; I was going to the commissary to buy some things, but I expected to stop at the boarding house. Q. In going from your house you come down the pathway? A. Yes, sir. Q. You know where that strikes the road. About how far from the cattle guard did you strike the railroad in this path? A. Yes, sir; but I did not take the railroad immediately. Q. The railway embankment was how far from the cattle guard when you came to the embankment? A. Forty or fifty yards. Q. Did you— When you came to that track, what did you do? A. I looked, and saw no one near; then I walked on down, as it was my custom. Q. You say that you saw no one near. Did you look out for the trains? A. Yes, sir; and there was no train; I heard none. Q. You looked

St. Louis Southwestern Ry. Co. v. Purcell

up and down the track? A. Yes, sir. Q. What did you do then? A. I went on to the cattle gap, I reckon, in 10 or 15 feet. Of course, I did not notice the distance. Then I took the track and crossed the gap. Q. Then I understand you walked along the path? How close was that to the end of the ties? A. I do not know, sir; I reckon the path was four or five. I do not know, sir; it was a good wide path—a pleasant pathway. Q. Then how far from the cattle gap when you got on the railway track? A. I do not know; do not think it was more than eight or ten feet. Q. Eight or ten feet before you got there you stepped on the railway track? A. Yes, sir. Q. State to the jury, when you struck the railway track, whether you looked for any train? A. Yes, sir; of course, naturally I should do that, because I had the cattle gap to pass. Q. Did you see or hear any train? A. No, sir. Q. How far down the track could you see? Could you see the whistling post? A. Yes, sir. Q. You could see or hear no train? A. No, sir, nothing in view, because I noticed for that. Then after I took the track I felt perfectly safe, because I knew I had the whistling post between me and any danger. Q. When you stepped on the track, was the wind blowing? A. Yes, sir, blowing from the north. Q. How were you dressed that morning—have on a hat or bonnet? A. Bonnet. Q. Ordinary sun-bonnet? A. Yes, sir. Q. Then the wind was blowing in your face? A. Yes, sir. Q. Do you remember where you were when the car struck you? A. No, sir; not exactly, but I think I was at least 15 or 20 feet or yards beyond the gap; I know I was beyond the gap. Q. What position were you in the last that you remember? A. We had to cross the cattle gap to get out of the field; then I took to the side until I could get a good stepping-off place. Q. There was an embankment there coming out of the cattle gap; could you step right off of the cattle gap? A. I walked out some distance after passing the cattle gap, because the wire fence was there, because it was low marshy place where drift had gathered there, and as I walked off of the cattle gap I gradually went to one side of the track. Q. You think you were somewhere about what distance from the cattle gap when it struck you? A. I was 20 feet or more, I know. Of course, I do not know exactly; I know that I was a good distance from the cattle gap. Q. Do you know whether or not you had started off of the track, or were you in the middle of the track? A. No, sir; was not in the middle of the track. Q. Did you hear any bells ringing or signals given? A. No, sir; there was not any. Q. There was none? A. No, sir. Q. If the bell had been rung or whistle blown, could you have gotten off? A. Yes, sir; the gap is not a very wide one. Q. You were in the habit of going along there? A. Yes, sir. Q. You had not been in the habit of trying to beat trains across there? A. No, sir. Q. In going along that path there, would any one be in danger of being struck by the train? A. I do not know; I never tried it; I would not try it. I suppose I would have made it along there, but not on the cattle

St. Louis Southwestern Ry. Co. v. Purcell

guard. Q. Would you have walked along there when a train was passing? A. No, sir; I have better sense than that. * * * Q. What was there to have prevented you seeing a train along there after it got around the curve? Was there anything? A. No, sir; nothing to prevent seeing it. Q. Nothing to prevent you from seeing them or from their seeing you? A. No, sir. Q. No trees on the embankment that would prevent them from seeing you or you from seeing them? A. No, sir, no obstruction at all."

If, as she says, before entering on the track to cross the cattle guard, she "stopped and looked and listened," she must have seen the train imminently approaching, because, under her own and the other evidence, it is clear that for 300 yards or more the track was unobstructed. Her testimony under such circumstances ought not to be credited, or taken as raising a conflict in the evidence. See, on subject, *Chicago & N. W. Ry. Co. v. Andrews* (C. C. A.) 130 Fed. 71 et seq., and cases there cited.

If Mrs. Purcell is mistaken with regard to stopping and looking and listening before she entered on the track to cross the cattle guard, of course her negligence is apparent. For the lack of evidence showing negligence on the part of the agents of the defendant railway company, and for the negligence contributing to her own injury, as shown from the undisputed facts and Mrs. Purcell's own testimony, the jury should have been directed to return a verdict for the defendant, and the refusal of the requested instruction to that effect requires a reversal of the judgment below.

In our opinion, Act No. 68, p. 95, of the Laws of Louisiana, entitled "An act to amend and re-enact article 2402 of the Revised Civil Code of 1870," approved June 30, 1902, and providing "that damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone." was not intended to have any retroactive effect. The act contains no repealing nor saving clause, and, if given a retroactive effect, might affect rights and interests in communities of acquets and gains running back many years. The right of Purcell to recover from the railroad company for injuries to his wife was fully vested when Act No. 68 was passed. We cannot presume, in the absence of plain language to that effect, that there was any intention to divest the rights so vested, and perhaps take away all right to recover. See article 8, Rev. Civ. Code La., and article 166, Const. La. 1898. If we give the effect claimed by plaintiff in error to Act No. 68, we should have to hold in this present case that the husband could not recover because his right had been divested, and that the wife could not recover because she came too late. This disposes of the several assignments of error based upon Act No. 68, to wit, the right of Purcell to sue, his right to testify, and the prescription of one year against the wife's right to sue.

Riley v. Shreveport Traction Co

If Purcell was the proper plaintiff to recover, and if he signed the document produced by the witness John Crocker, it would seem that such document was admissible in evidence, although Purcell swore he signed it only as a witness, and did not know of its contents. The other assignments of error need not be considered.

The judgment of the Circuit Court is reversed, and the cause is remanded with instructions to set aside the verdict and otherwise proceed according to law and in accordance with the views herein expressed.

RILEY v. SHREVEPORT TRACTION CO.

(Supreme Court of Louisiana, Jan. 30, 1905.)

[38 So. Rep. 83.]

Collision between Street Car and Wagon—Care Required of Driver.*—Those who drive wagons in the streets and seek to cross from one side of the street to the other, should be reasonably careful, and not cross too near, for safety's sake, a fast approaching car.

Same—Contributory Negligence.—The plaintiff, driver of the wagon, saw the car at a considerable distance away. Instead of driving across after leaving an intersecting street, he turned to the left of the street on which he was, drove a few feet, and then turned to the right, and sought to cross the street diagonally in the direction the electric car was coming. The result was a head-on collision.

Same—Same—Testimony.—The driver's testimony in regard to the asserted impediments of the track which prevented him from hastily crossing is not sustained by the allegations of his petition nor by the weight of the testimony.

Same—Negligence—Evidence.—The fact that a car runs quite a distance after an accident is not conclusive that there was negligence on the part of the motorman, if the weight of the testimony shows that the car was disabled in the collision, and thereby became uncontrollable, and for that reason slipped many feet on the wet rails.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by S. S. Riley against the Shreveport Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Murff & Webb, for appellant.

Wise, Randolph & Rendall, for appellee.

BREAUX, C. J. Plaintiff alleges that the defendant is indebted to him in the sum of \$12,200 damages.

*As to the care required of those driving other vehicles on streets upon which street cars are operated, see foot-note appended to *Sullivan v. Boston Elev. Ry. Co.* (Mass.), 11 R. R. R. 512, 34 Am. & Eng. R. Cas., N. S., 512; foot-notes appended to *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *McGauley v. St. Louis Transit Co.* (Mo.), 11 R. R. R. 247, 34 Am. & Eng. R. Cas., N. S., 247; *Hogan v. Winnebago Traction Co.* (Wis.), 11 R. R. R. 232, 34 Am. & Eng. R. Cas., N. S., 232.

Riley v. Shreveport Traction Co

The case was tried before a jury. Their verdict was against him. He moved for a new trial, which was refused. He prosecutes this appeal.

In December, 1903, at about 7 o'clock, after dark, plaintiff, the driver of a one-horse delivery wagon for A. Dabrantes, a merchant of Shreveport, was returning to the business place of his employer, and on his way was driving out of Division street of that city into Texas avenue, one of the main thoroughfares of the city.

Immediately after having turned in an easterly direction on Texas avenue, he determined to cross to the north side, it being the right in the direction he was going. He attempted to cross the street in a diagonal direction. Just then one of the cars of defendant company was east of Division street, coming on in the direction of plaintiff. The front part of the car collided with plaintiff's wagon, and caused the injury of which plaintiff complains, and for which he asks for damages.

The defendant answered by a general denial, and in addition charged that plaintiff was guilty of contributory negligence.

It appears that wagons, carts, and carriages pass frequently to and fro on the avenue, and on the night of the accident, in addition to these, there was a "sweeping machine" at this point, drawn by three mules. They took up a good portion of the avenue. Plaintiff's contention is that, owing to the dangerous rate of speed at which defendant's car was running, and the "sweeping machine," and a wagon which was in his way when he attempted to cross from one side of the avenue to the other, he was unable to make it in time to avoid the accident.

The driver of the "sweeping machine," a witness for plaintiff, testified that he had passed the car some 30 feet when the collision took place. Plaintiff, he said, was driving a gray horse, which enabled him to identify the wagon. He drove in a trot, while the mules driven by witness were walking.

If this machine had already passed the car about thirty feet, as witness states, it is difficult to understand how it prevented plaintiff from crossing the avenue. It had already passed him, and was not in his way to his driving to the side on which the sweeper was.

On his examination as a witness the following is one of the questions he answered relative to his attempt at crossing the street:

"Q. You know your 'street sweeper' did not prevent it in any way?

"A. It was not in the way."

The plaintiff, in his testimony, says:

"The wagon was about half way over the track, and, just as I was trying to get in front of the 'street sweeper,' a wagon came along by the side, going out, and blocked me, which caused me to be blocked by the wagon and sweeper."

This is not corroborated by the driver of the sweeper. He testified he knew nothing about it.

Riley v. Shreveport Traction Co

Moreover, plaintiff alleged (we copy from his petition): He shows that, after he had driven upon the track, a street sweeping machine drawn by several mules was driven directly in front of his wagon, and barred his passage. In his testimony plaintiff sought to prove that a wagon—not particularly the sweeping machine—was in his way, and prevented him from crossing in time to get out of the way of the car.

The car could have been seen at a distance had the plaintiff chosen to look. He admitted that he had seen it at considerable distance (about 75 yards). Taking his most favorable admission on the side of his cause, he saw the car at a distance of about 75 feet. He was driving at a trot. Why did he not drive right on, and cross the street?

Other testimony, which the jury must have believed, located him much nearer the car than he thought he was at the time. Twenty or thirty feet was mentioned. It appears to us from the result that he must have been quite near. The front of the car was shattered in great part, and the wagon on which plaintiff was was broken in two, and part remained on the car front as it passed on to about 700 feet further.

The testimony discloses that the rate of speed of street cars in Shreveport is 12 miles an hour, and that was about the rate of speed of defendant's car at the time of the accident. The force of the impact must have been great. Its noise was heard at some distance. It appears that the brakes were disabled. The lights were put out, the block shoes were loose, and in its uncontrollable condition it slipped on, by the force of its momentum, the distance we have already mentioned.

We are informed by the testimony of the motorman, who is not contradicted, and whose testimony we have no reason not to believe, that he cut off the electricity in time; that he set his brake, and then reversed the power.

It could not prevent the collision, as the wagon was up to the car.

The point urged that the speed of the car must have been dangerously fast for the car to run on the distance it did after the collision. This view would have great, and even controlling, weight, if it were not for the force of the impact and its effect in breaking up things as already stated; and, besides, the direct testimony shows, we take it, that on wet rails—it had rained a short time prior to the accident—cars might slip on the number of feet mentioned, if not under control, as this was, owing to no fault of the motorman, as we infer.

There are two parties to this accident—one, the motorman, who should at all times be alert while on duty; the other, the plaintiff, who undertook to cross, and assumed the risk of crossing when threatened by immediate danger.

The plaintiff, as a witness in his own behalf, stated that "he made a dash to get across." From that point of view an attempt made with full knowledge of the coming car while facing it as

St. Louis, etc., Ry. Co. v. Evans

it comes, if at all reckless, must be held under repeated decisions upon the subject to bar recovery.

There is not sufficient evidence of a conclusive character to establish the fact for which plaintiff contends and to exonerate him from carelessness.

While those who use the public streets have rights they cannot be relieved from, the necessity of exercising reasonable vigilance and attention in view of an advancing car which he has opportunity to see and does see. *White v. R. R. Co.*, 42 La. Ann. 990, 8 South. 475.

Drivers must avoid reckless driving in advance of a coming car. *Ponsano v. Street Railroad Co.*, 52 La. Ann. 245, 26 South. 820.

The rights of the public to use the streets and the street railroad company's to use their tracks are reciprocal. Mr. Elliott, in his work on *Roads & Streets* (second edition), says:

"Neither being superior nor paramount to the other, except that, as the company cannot so readily stop its trains or cars and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed."

The use becomes extraordinary where the traveler sees the car, and yet ventures to cross, although he knows that it is dangerously near.

The jury and the judge saw and heard the witnesses. They observed their manner of testifying. They were familiar with the locality. They arrived at the conclusion that defendant is not liable. To recover, it devolved upon the plaintiff to prove the erroneousness of the verdict and judgment. A careful reading of the testimony has not convinced us that error had been committed. The issues are mainly of fact.

We do not take it that there is any dispute regarding the law.

To the jury's verdict regarding facts some importance, in the nature of things, is attached.

The verdict and judgment are affirmed.

PROVOSTY, J., not having heard the argument, takes no part.

ST. LOUIS, I. M. & S. RY. CO. *v.* EVANS et al.

(Supreme Court of Arkansas, March 4, 1905.)

[86 S. W. Rep. 426.]

Accident on Track—Discovered Peril—Sufficiency of Evidence.—In an action for death alleged to have been caused by the negligent operation of a railroad train, evidence held to support a finding that the engineer discovered deceased on the track while at a sufficient distance to have avoided the injury.

St. Louis, etc., Ry. Co. *v.* Evans

Same—Negligence in Failing to Discover Plaintiff's Peril and Contributory Negligence.*—Where the operatives of a locomotive, if in the exercise of due care, could have seen deceased walking on the track at a sufficient distance to avoid injury, but failed to give any warning of the approach of the locomotive, which killed deceased, the railroad company was liable, although deceased was negligent in failing to look and listen.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Luina Evans and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Appellees, the widow and children of P. M. Evans, deceased, brought this suit against appellant railway company for damages accruing to them on account of the killing of the said Evans by one of appellant's locomotives on December 23, 1901. The complaint alleges that Evans was walking along the railroad track when he was run over and killed; that the locomotive was being run at a high and dangerous rate of speed; and that appellant's servants in charge of the locomotive, after discovering him upon the track for a distance of more than 300 yards ahead, and seeing that he was unconscious of the approach of the locomotive, wrongfully, willfully, and negligently failed and refused to give any danger signals or check the speed of the train so as to avoid injuring him, but, on the contrary, willfully, recklessly, and wantonly ran the locomotive against him, thereby causing his death. Appellant, in its answer, specifically denied all the allegations of the complaint, and also pleaded that the death of Evans was caused by his own negligence. The defendant introduced no testimony, and the testimony of plaintiffs' witnesses tended to establish the following state of facts: Evans and several companions visited the incorporated town of Mulberry, in Crawford county, on the day he was killed, and started on their return home about 2 or 3 o'clock in the afternoon. Leaving the business part of town, they came south along Main street, and went upon the railroad track where it crosses this street, and turned west on the track; intending to follow the track to the railroad bridge across a small stream called "Little Mulberry." Footmen frequently followed that route in order to cross the stream upon the railroad bridge, there being no other bridge at that point. Evans and one of his companions (John Hobb) were

*See foot-note appended to *Carter v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas., N. S., 324.

As to the combined effect of contributory negligence and negligence after the discovery of the injured person's peril, see *Harrington v. Los Angeles Ry. Co.* (Cal.), 9 R. R. R. 191, 32 Am. & Eng. R. Cas., N. S., 191; *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643.

As to whether those in charge of trains or cars have the right to assume that persons at or near tracks will avoid danger, see foot-note appended to *Simpson v. Rhode Island Co.* (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

St. Louis, etc., Ry. Co. v. Evans

walking along the main track, and two others were walking along the side track, all going west, and were about 150 feet west of the Main street crossing, and about 250 feet west of the Mulberry station, when Evans was struck by the locomotive. The train, consisting of a locomotive, tender, and caboose only, approached from the east, and ran through the town at a high rate of speed, without stopping. The witnesses stated that the whistle was sounded about a fourth of a mile east of the station, but that neither whistle nor bell were heard afterwards. Evans and John Hobb gave no indication that they were apprised of the approach of the train until it was within about 50 feet of them, when one of the party on the side track warned them of the danger by crying, "Look out, boys! train is coming," at which they quickly attempted to get off the track, and Hobb narrowly made his escape, but Evans was struck by the engine just as he passed off the south side of the track. When the warning cry was given, Evans appeared much excited—so the witnesses say—and first made a motion as if to go to the north side of the track, but changed and went back to the south side, attempting to escape.

At the close of the testimony the defendant asked for a peremptory instruction in its favor, which was refused, and other instructions asked by the defendant were also refused.

The court of its own motion gave the following instructions, viz.:

"(a) If you find from a preponderance of the evidence in this case, either direct or circumstantial, that, in time to have avoided injuring Evans, the operatives of the engine which struck him saw him walking along the track, and knew or had reasonable grounds for believing that he was not aware of the approach of the engine and car attached, and so oblivious to his danger, and thereafter failed to give him timely warning or to use reasonable means to avoid injuring him, but thereafter willfully or wantonly and recklessly ran the engine and car onto and against him, you will find for the plaintiffs. If the evidence fails to show all these things by preponderance, you will find for the defendant.

"(b) If the operatives of the train did not see Evans at all on the track, or, if they did see him, but too late to give him warning or to do anything to avoid injuring him, then in such case the defendant is not liable; and this notwithstanding you may find that the train was being operated at a greater rate of speed than was prudent, and that no watchout was kept as required by law, and no bell rung or whistle sounded."

On motion of the defendant the court submitted to the jury special findings of fact, and the jury answered the same, as follows:

"(1) Did the deceased know the train was coming in time to get off the track? Answer. No.

"(2) Was the deceased able, after he saw the train coming, to get off the track? Answer. No.

St. Louis, etc., Ry. Co. v. Evans

"(3) When did the engineer first see the deceased? Answer. A sufficient distance to avoid injury.

"(4) When could the engineer first have seen the deceased, had he looked? Answer. A distance of three hundred yards."

The jury returned a verdict for \$3,730. The court rendered judgment accordingly, and the defendant appealed.

Oscar L. Miles, for appellant.

Saml. R. Chew and *Henry L. Fitzhugh*, for appellees.

MCCULLOCH, J. (after stating the facts). We find no error in the instructions given by the court to the jury. They correctly and concisely declared the law applicable to the case.

It is conceded that Evans was guilty of negligence, which contributed to his death, in failing to look and listen for the approaching train; and the case turns solely upon the question whether the agents and servants of the railway company in charge of the locomotive saw him upon the track in time to have prevented the injury by the exercise of proper precaution, and, seeing him, whether they exercised proper care and precaution to prevent the injury. The jury, in their special verdict, found that the engineer discovered the deceased ahead of the locomotive "sufficient distance to avoid injury," and the testimony was sufficient to warrant that finding. The track was clear; no obstructions intervened for a distance of 300 yards; it was in the daytime; and the witnesses saw the engineer and fireman on the engine occupying positions from which they must have plainly observed the men upon the track in front of the approaching train. These facts were not denied, and appellant made no effort to prove to the contrary, though the engineer was present at the trial, and was introduced as a witness by appellees as to his familiarity with the track through the town of Mulberry.

The contributory negligence of a person injured is no defense where the direct cause of the injury complained of is the omission of the defendant, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequence thereof. *L. R. & Ft. S. Ry. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505. The true rule, which runs through the repeated decisions of this court, on the subject, is stated in *R. Co. v. Pankhurst*, 36 Ark. 377, as follows: "One who is injured by the mere negligence of another cannot recover, at law or equity, any compensation for his injury, if he, by his own or by his agent's ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." *St. L., I. M. & Sou. Ry. v. Freeman*, 36 Ark. 46; *L. R. M. R. & T. Ry. Co. v. Haynes*, 47 Ark. 497, 1 S. W. 774; *St. L., I. M. & Sou. Ry. v. Monday*, 49 Ark. 257, 4 S.

St. Louis, etc., Ry. Co. *v.* Evans

W. 782; Same *v.* Wilkerson, 46 Ark. 513; Kansas & A. V. R. Co. *v.* Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211. In St. L., I. M. & Sou. Ry. *v.* Wilkerson, *supra*, this court said: "If the employees of a railroad company in charge of its train see a man walking upon its track at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf or insane, or for some other cause insensible of the danger or unable to get out of the way, they have a right to rely on human experience, and to presume that he will act upon the principles of common sense and the motive of self-preservation common to mankind in general, and will get out of the way, and go on without checking the speed of the train until they see he is not likely to get out of the way, when it would become their duty to give extra alarm by bell or whistle, and, if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check its speed, or stop the train, if possible, in time to avoid disaster." That the doctrine stated in these decisions is well sustained by authority may be seen by the numerous cases cited therein, and it is not necessary to restate them here.

There is no testimony in the case to show that the deceased gave any visible evidence whether or not he was aware of the approach of the train until his companion warned him after the locomotive had nearly reached him, and he made the futile attempt to escape; and, if the danger signals had been sounded by the operatives in charge, they would have had the right to presume that he would step off the track and get out of the way. But without having given any of the customary warnings of danger by sounding the whistle or ringing the bell, they had no right, unless deceased gave some evidence that he was aware of the approach of the train, to presume that he had heard the ordinary noises of the moving train, and would get off the track in due time to avoid the injury. This is especially true when the train was being run at an unusually high rate of speed in a populous locality, and near the railroad station, where it was customary to stop the train or reduce the speed, and where deceased, if he heard the noise behind him, doubtless expected it to be stopped or the speed greatly reduced. Appellant is not liable in this case because its servants did not stop the train, or because they ran the locomotive at an unusually high rate of speed; but it is liable because of the fact that, under those circumstances, seeing the deceased on the track, ahead of the swiftly approaching train, and giving no evidence that he was aware of its approach, they negligently failed to give him any warnings of the peril. Using the language employed in *Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 270, 9 South. 233: "Such failure, with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence, to the end of neutralizing plaintiff's fault and averting disaster, notwithstanding his lack of care, * * * is that recklessness or wantonness,

Georgia Ry. & Elec. Co. v. Wallace & Co

or worse, which implies a willingness to inflict the impending injury, or a willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate wrong." Judge Thompson says: "The most obvious suggestion of prudence and social duty requires that the engineer who is driving the train shall give warning signals to a trespasser whom he sees on the track in front of the train, with his back to it, in sufficient time to enable him, after hearing the signals, to quit the track in safety; and this is so although the trespasser suddenly and unnecessarily assumes a place in dangerous proximity to the track." 2 Thomp. on Neg. § 1741; Railway Co. v. Smith, 62 Tex. 254; Houston & T. C. R. Co. v. Harvin (Tex. Civ. App.) 54 S. W. 629; L. & N. R. R. v. Coleman's Adm'r, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875; 2 Rover on Railroads, p. 1027; B. & O. R. Co. v. Schroeder, 69 Md. 551, 16 Atl. 212.

The instructions of the court properly set before the jury for their guidance these principles of the law, and we think the testimony was sufficient to sustain their findings thereon. Affirmed.

GEORGIA RY. & ELECTRIC CO. v. WALLACE & CO.

(Supreme Court of Georgia, March 27, 1905.)

[50 S. E. Rep. 478.]

Evidence—Compromise.*—Evidence of compromise is excluded, because inherently harmful, and calculated to leave the impression on the minds of the jury that the settlement was an admission of responsibility, even though coupled with a denial of liability.

Same—Same.—The rule which excludes propositions of compromise between the parties also excludes evidence of compromise between the defendant and third persons damaged in the same casualty.

Same—Same.—The error in admitting incompetent evidence as to a settlement was not cured by the fact that the defendant itself offered the writing in evidence to show that it contained a denial of liability.

Injury to Animals—Damages.—The charge as to the right to recover for the hire of the animals injured, while abstractly correct, was harmful to the defendant, in that the jury were not instructed that they could not in any event allow more for injury and loss of hire than the sound value of the horses at the time of the injury.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Wallace & Co. against the Georgia Railway & Electric Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Wallace & Co. sued the Georgia Railway & Electric Company for damages to a landau, a pair of horses, and harness. For the plaintiffs, it appeared that the company ran two cars very rapidly

*See foot-note appended to Chicago, etc., R. Co. v. Roberts (Colo.), 15 Am. & Eng. R. Cas., N. S., 572.

Georgia Ry. & Elec. Co. v. Wallace & Co

along the road from East Point to Atlanta, the first car having a headlight and ringing a gong; that the car immediately following had no headlight and rang no gong; that after the first car passed, the driver of the landau turned to the right in order to let a wagon pass, and just as he got on the track he was hit by the second car. It was claimed that he did not hear it; that the absence of the headlight and the failure to ring the gong was the cause of the driver's being ignorant of its approach. For the defendant, there were several witnesses who testified that the driver was drunk; that there was no wagon approaching; that there was no necessity for turning to the right; that the car was running at the usual speed; and that the injury was occasioned by the driver's suddenly turning to the right, and when the car was so close upon the carriage it was impossible to stop. It appears that the defendant company paid the driver \$25 in settlement of any claim he might have for personal injuries received at the time of the collision. While the driver was on the stand, the plaintiffs asked him if he had been settled with, and he replied that the defendant paid him \$25. The defendant objected to this evidence, and the court promptly excluded it. The defendant moved for a mistrial. The motion was overruled, and the company excepted. The court instructed the jury that the compromise was no evidence of liability, and that the jury would disregard it. But the defendant insists that, after such evidence had been once admitted, it was impossible to remove the effect thereof from the minds of the jury. While the driver was on the stand the company laid the foundation for his impeachment, and introduced an affidavit, signed by him eight days after the collision, in which he admitted that he was drunk, and was reckless in his driving, and that the company was free from fault. In rebuttal, the driver denied the execution of such an affidavit, and, over the objection of the defendant that the same was irrelevant, was allowed to testify that he signed no paper in connection with the collision, except a receipt for \$25, which was paid him by the defendant. The defendant excepted. In its charge the court instructed the jury that the receipt was only to be considered in its character as impeaching testimony. The receipt, among other things, contained a statement that the payment of \$25 is not to be construed as an admission on the part of the company of any liability whatever in consequence of such action. It was dated October 10, 1902. The affidavit admitting that he was drunk, that he pulled the team directly in front of the street car, and on account of the closeness to the car the motorman could not stop before striking him, was dated October 8, 1902.

There was evidence that the landau, when new, cost a thousand dollars; that the plaintiffs bought it at secondhand for \$200; that they paid \$70 for one horse, and about \$200 in a trade for the other. The horses were in good shape. They were easily worth \$300. The horses were hurt 50 per cent. Both horses were of about the same value before injury. For hiring they were worth

Georgia Ry. & Elec. Co. v. Wallace & Co

from \$1 to \$3 a day, "ought to make a dollar and a half apiece a day, or a dollar—anywhere from a dollar to three dollars." The harness was worth \$50 to \$75; damaged 15 to 20 per cent. after being repaired. It cost in the neighborhood of \$200 to repair landau. It was worth anywhere from five to seven hundred dollars; after being repaired, still worth about 30 per cent. less. The petition averred that the landau was reasonably worth \$800, and was rendered entirely valueless by the collision; that the harness was worth \$150, and had been rendered wholly valueless; that the horses were reasonably worth \$450, and were rendered entirely useless for life. Taking the evidence most favorably for the plaintiffs, the damage was as follows:

50 per cent. damage to the horses.....	\$150 00
Loss of hire of horses.....	240 00
Repair to landau worth \$700.....	200 00
30 per cent. depreciation notwithstanding repair.....	210 00
20 per cent. damage to harness.....	15 00
	<hr/>
	\$815 00

Taking the evidence most unfavorably to the plaintiffs, the damage was:

50 per cent. damage to horses.....	\$150 00
Loss of hire of horses.....	240 00
Repair of carriage (worth \$500).....	200 00
30 per cent. of \$500, notwithstanding repair.....	150 00
15 per cent. of \$50 harness.....	7 50
	<hr/>
	\$747 50

By an amendment the plaintiffs alleged that both horses were rendered useless for a period of four months; that each was worth to the plaintiff at the time of injury \$1 a day; that on account of the injuries the plaintiffs had been damaged, on account of the loss of their services, \$240; and that they have not, and will never be, worth what they were worth prior to the injury, by at least one-half. This amendment was demurred to on the ground that it set up an improper and illegal measure of damages, and that the evidence already offered showed that the total value of both was only \$300, that they had been injured 50 per cent., and that to be allowed to recover the damages claimed in the amendment would enable the plaintiffs to get more than the horses were worth before they were injured. The amendment was allowed, and the plaintiffs offered evidence in support thereof. Error is assigned because the court charged: "In addition to the actual injury to the property, the plaintiffs allege that during a period of four months they were engaged in an effort to cure the horses and restore them to soundness, and that during that period they actually lost a dollar a day, the total sum being \$240. You will look to the evidence and ascertain what the truth is in regard to that specification of damages; if it is sustained by the evidence, it would be a legitimate item to be allowed in their favor." The jury found a verdict for the plaintiffs for \$422.81.

Georgia Ry. & Elec. Co. v. Wallace & Co

Rosser & Brandon, W. T. Colquitt, and B. J. Conyers, for plaintiff in error.

Andrews & Skeen, for defendants in error.

LAMAR, J. (after stating the facts). It costs time, trouble, and money to defend even an unfounded claim. Parties have a right to purchase their peace. The fact that they have entered into negotiations to secure that end, admissions, or propositions made with a view to a compromise are not admissible in evidence for or against either litigant, in the event there is a failure to adjust and a suit follows. For a much stronger reason, evidence of a settlement with a third person injured in the same casualty ought to be excluded. The court therefore properly held that, in a suit for the recovery of damages to a carriage and horses, it was incompetent to show that the defendant had settled with the driver for any claim that he might have for personal injury received in the same collision. If such evidence was inadmissible on the direct examination, it was likewise inadmissible on the redirect to allow the witness to testify that he had not signed "any paper in connection with the collision, except a receipt for \$25, which was paid him by the defendant." The foundation of the impeachment was the affidavit. The redirect examination should have been confined to an inquiry as to whether he signed it. The witness could have denied or explained his signature. But as the receipt itself could not have been offered against the defendant, it was doubly incompetent for the witness to state its contents, when the contents themselves were inadmissible, because showing that a settlement had been made. Nor was this error cured because the defendant endeavored to meet the necessity thus improperly imposed. It offered the receipt to lessen the injurious consequences of the adverse decision by showing that it contained a statement that the company did not admit liability for the collision. It was an attempt, though necessarily an unavailing attempt, to remove from the minds of the jury the impression that the payment to the driver was a settlement of an admitted liability. Nor was the error in the admission of the evidence of the witness cured by instructing them that the evidence as to the settlement could only be considered for the purposes of impeachment. The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence.

The charge as to the right to recover for the loss of hire during the period the horses were idle because of the injury stated a correct principle. But as given, it was harmful to the defendant. It did not instruct the jury that they could not in any event allow more for injury and loss of service than the sound value of the animals. *Atlanta Co. v. Hudson*, 62 Ga. 683 (2); *Telfair*

Hollingshead v. Camden & Suburban Ry. Co

Co. v. Webb, 119 Ga. 916, 47 S. E. 218 (2). Excluding the price originally paid, but which the jury had a right to consider (Baker v. Richmond, 105 Ga. 225, 31 S. E. 426), and taking the evidence most favorably for the plaintiffs, it appeared that their sound value was \$300; that after the injury they were only worth \$150, and therefore only \$150 was recoverable for loss of hire. Yet, under the charge, the jury could have allowed \$150 for damages and \$240 for loss of hire. This was an error of \$90 against the defendant. The verdict was for \$422.81, which was less than the minimum damage to carriage, harness, and horses proved by the plaintiffs under any theory of the case. From this it must be concluded that the jury found that the driver was guilty of contributory negligence. But there was no basis for the trial judge or this court to make a calculation by which to cure the verdict by writing off the \$90 in excess recoverable under the charge as given. If, because of contributory negligence, the jury made a deduction in other items, they may likewise have made a deduction of this item.

Without passing upon the other grounds of the motion, the charge as to damages, and the admission of evidence as to a settlement, require the grant of a new trial, and the judgment is reversed. All the Justices concur.

HOLLINGSEAD et al. v. CAMDEN & SUBURBAN RY. CO.

(Supreme Court of New Jersey, April 11, 1905.)

[60 Atl. Rep. 514.]

Street Railroads—Negligence—Collision—Instructions.*—Upon the trial of an action against a traction company to recover damages for the partial destruction of a wagon with which an electric car collided, the trial judge, without objection, instructed the jury as to the duty of the motorman in terms that made the traction company an insurer against collisions under particular circumstances specified. He then refused a request for instructions to the effect that the motorman was not obliged to foresee that the driver of the wagon would leave his place of safety beside the track, and turn across the track, until he did so turn. Held, under the evidence in the case, and in view of the instructions actually given, that the refusal of this request was erroneous.

(Syllabus by the Court.)

Certiorari to Court of Common Pleas, Burlington County.

Action by Ellwood Hollingshead and William D. Rogers against

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to Searles v. Elizabeth, etc., Ry. Co. (N. J.), 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781; foot-notes appended to Holden v. Missouri R. Co. (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440; foot-notes appended to Rawitzer v. St. Paul City Ry. Co. (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; foot-note appended to Anniston Electric & Gas Co. v. Hewitt (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

Hollingshead v. Camden & Suburban Ry. Co

the Camden & Suburban Railway Company. Judgment for plaintiffs, and defendant brings certiorari. Reversed.

Argued November term, 1904, before FORT and PITNEY, JJ.

Franklin M. Lewis, for plaintiff.

Nelson Burr Gaskill, for defendant.

PITNEY, J. This certiorari is brought to review a judgment of the common pleas in favor of the plaintiff, entered upon the verdict of a jury, upon trial of an appeal from the small-cause court. The action was brought to recover damages for the partial destruction of an ice wagon owned by the plaintiffs, with which a trolley car collided. The collision took place on Main street, in Moorestown, while the wagon was in charge of two employees of the plaintiffs, who were delivering ice to residents along the street. Immediately before the collision they were driving easterly along the southerly side of the street, quite clear of the trolley tracks; and then, having occasion to cross the street, they turned to the left, nearly at right angles, and drove across the tracks. Defendant's electric car was coming from the westward, and struck the wagon while it was upon the tracks in crossing. There was a motion to nonsuit, based solely on the ground of contributory negligence in the agents of the plaintiffs. A motion was also made to direct a verdict for the defendant, but without specifying any grounds for the motion, and so at most it raised no question beyond that raised by the motion to nonsuit. An examination of the evidence convinces us that both motions were properly denied, there being plainly disputable questions for the jury's consideration, both with respect to the negligence of defendant's motorman and with respect to the conduct of the occupants of the wagon.

The remaining reasons assigned for reversal relate to the charge of the trial judge to the jury. No objection was made below to the instructions as given, the sole criticism there suggested being to the refusal of the judge to accede to the defendant's requests to charge. All the requested instructions were given with a single exception. In the refusal of this one we find substantial error. For an understanding of the point it should be premised that testimony was introduced by the defendant (the witnesses being the motorman and a passenger who was in the car at the time) tending to show that as the car approached the wagon it was running at very moderate speed, and that the motorman gave signal of his approach by ringing the gong; that the wagon, which up to this point had been proceeding close to the rail of the trolley track, was thereupon driven from the rail towards the curb at the side of the street, and that as the motorman undertook to pass the wagon the driver turned suddenly across in front of the car; that when this turn was made the wagon was only 20 feet from the front of the car; and that with the best efforts of the motorman it was impossible to stop the car in time to avoid a collision. This evidence was strongly con-

Hollingsead v. Camden & Suburban Ry. Co

tradicted by the testimony on the part of the plaintiffs, but, of course, the defendant had the right to ask the jury to believe it, and to give proper effect to it if believed. On the motorman's statement, there was nothing to charge him with notice of an attempt by the driver of the wagon to cross the tracks until a point of time so late as to render it impossible to stop the car with the use of the ordinary appliances. In this juncture the trial judge instructed the jury as follows: "It is the duty of the defendant to have appliances, and a motorman who can use those appliances, and who does use them in such a way as to prevent an accident. If you believe, under these circumstances, that this car had these appliances, and that they had a motorman who did use these appliances, and that he attempted to stop, but could not stop his car by reason of the wagon turning immediately in front of him, then it is your duty to find a verdict for the defendant. But when the wagon did turn upon the track to cross it, if the car was far enough away for the motorman to stop it before it struck the plaintiffs' wagon, and the motorman did not use these appliances, and did not stop his car, then the defendant is liable in damages." This language is open to the criticism that it seems to make the traction company an insurer against collisions under the particular circumstances specified. But as no objection was made below, this criticism is not here important, except as the clauses quoted have a bearing upon the action of the trial judge in refusing defendant's request for the following instructions, viz.: "A motorman is obliged to have his car under control as he approaches a wagon beside the track, but he is not obliged to infer that the driver will leave his place of safety and turn in upon the track." To this the court's response was: "I charge you that a motorman is obliged to have his car under control as he approaches a wagon beside a track. I will not charge the latter part, but I will say that it is his duty, if the driver does leave his place of safety and turn in upon the track, to have his car under such control that he can stop his car, if it is possible to stop it, before reaching the wagon which crosses the track." The effect of this refusal was to place upon defendant's motorman the burden of foreseeing that the driver was about to turn across the track, when there was nothing to give the motorman notice of the driver's intention. If it were admissible to construe the request as negating the proposition that the driver ought to foresee the probability that a wagon proceeding along the side of the street may turn in order to cross the tracks, the refusal might be sustained. But the request conceded the motorman's duty to foresee a reasonable probability of the wagon being turned, for it admitted that the motorman must have his car under control. The defendant at the same time prayed that the jury should be instructed, in effect, that the motorman is not obliged to provide against an actual turning of the wagon until it does turn. This, we think, was a proper instruction reasonably requested by the defendant under the cir-

Louisville & N. R. Co. *v.* Sawyer

cumstances, and in view of the evidence presented by the defendant and the other instructions given to the jury the denial of this request was, we think, erroneous. This denial accentuated the effect of the rest of the charge in rendering the defendant company an insurer against collisions, whereas its duty is limited to the exercise of reasonable care to avoid them. *Solatinow v. Jersey City, etc., Ry. Co.* (N. J. Sup.) 56 Atl. 235.

Let the judgment be reversed, and a venire de novo awarded.

LOUISVILLE & N. R. CO. *v.* SAWYER.

(Supreme Court of Tennessee, March 25, 1905.)

[86 S. W. Rep. 386.]

Railroads—Overhead Crossings—Warnings.*—Where a railroad crosses a public road on an overhead bridge, no absolute duty rests on the company to give reasonable warning to travelers of the approach of a train by the usual signals; but, if the place is dangerous, the company must warn travelers on the highway of the approach of its trains; and whether the place, as a matter of fact, is dangerous, is a question for the jury to determine.

Appeal from Circuit Court, Williamson County; J. A. Cartwright, Judge.

Action by John H. Sawyer against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

John Bell Kuhle, C. R. Berry, and Henderson & Henderson, for appellant.

Hearn, McCorkle & Lane, for appellee.

MCALISTER, J. The defendant in error, Sawyer, recovered a verdict and judgment against the company for the sum of \$1,300 damages for personal injuries. The company appealed, and has assigned errors.

The gravamen of the action, as alleged in the declaration, is that Sawyer was driving in a buggy along a turnpike road, and, when about to pass under the overhead trestle of the company, a train of cars rapidly came upon the tracks, frightening plaintiff's horse, overturning the buggy, and throwing plaintiff to the ground, as the result of which he sustained serious personal injuries. The theory of the plaintiff below was that this was a dangerous crossing, and the company was guilty of negligence in not warning the public of an approaching train.

The declaration comprises five counts, but the substance of the complaint, as alleged in the first count, is:

*See foot-note appended to *Cleveland, etc., Ry. Co. v. Miles* (Ind.), 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536; foot-notes appended to *Reed v. Queen Anne's R. Co.* (Del.), 11 R. R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332.

Louisville & N. R. Co. v. Sawyer

"Said defendant, Louisville & Nashville Railroad Company, through and by its agents and servants, did carelessly, wantonly, negligently, and wrongfully, and without notice or warning to plaintiff, run, drive, and propel one of its said engines and trains of cars up to, upon, over, and across said overhead bridge, directly over and above said line of pike road upon which plaintiff was traveling in the way and manner aforesaid, on account of which careless, wanton, negligent, and wrongful act of defendant railroad company, the horse which plaintiff was driving became frightened," etc.

There is no complaint, either in the declaration or proof, that the horse was frightened in consequence of any excessive or unusual whistling or ringing of the bell or escaping of steam, which is usually the foundation of such actions, as illustrated by the case of *Mitchell v. Railroad*, 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426.

But it is conceded that the train approached this overhead bridge under which the plaintiff was about to pass almost noiselessly.

The complaint in this declaration is that it was the legal duty of the railroad company to warn travelers upon the highway, about to pass under the railroad track, of the approach of the train, and the failure of the company to perform this duty was the proximate cause of the accident.

There is proof tending to show that at the locus in quo of the accident the Louisville & Nashville Railroad crosses the Franklin & Nolensville Turnpike by means of an overhead trestle, resting upon massive rock walls, which project out on either side of the railroad, forming a narrow and restricted passageway under the railroad. The view of the approaching train was to some extent obstructed by houses, walls, hedges, etc.; and, though plaintiff was looking and listening for any train that might be coming from either direction, he neither saw nor heard the approaching train until about to start under the overhead bridge, when this train, running at the rate of about 40 miles an hour, suddenly appeared and passed over said trestle while plaintiff was passing under it, or just as he emerged from it on the eastern side. As a result thereof, plaintiff's horse became frightened, throwing plaintiff from the buggy to the ground, breaking his collar bone, and inflicting other serious personal injuries.

There is proof tending to show that, as a consequence of the fracture of plaintiff's collar bone, a knot or malformation had appeared on that part of his breast and shoulder where said collar bone was broken. According to the proof, the whistle was not sounded, nor the bell rung, as the train approached this overhead crossing. It is insisted that the company was under no obligation to ring the bell or sound the whistle at this point in obedience to the requirements of the statute, since the obstruction was not upon the track of the company, but beneath it.

The theory of the plaintiff is that the company was under a

Louisville & N. R. Co. v. Sawyer

common-law duty to sound the whistle on approaching a public highway extending under the railroad trestle, and which crossing, by reason of the topography of the country and the surrounding environment, was dangerous to the public traveling along the highway.

On the other hand, it is insisted on behalf of the company there is no common-law obligation on a railroad company to sound signals at an underpass, and no liability for any injury resulting from the frightening of a horse by the lawful and reasonable operation of a train over an underpass. The company therefore assigns as error the following instruction of the trial judge on this subject, viz.:

“It was the duty of the defendant company to give plaintiff reasonable warning of the approach of its trains, by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track. If you believe from the evidence in this case that the plaintiff, on approaching the overhead bridge, was in the exercise of due care and caution, as defined to you above, and while passing under the overhead bridge the defendant’s train ran over the bridge, having given plaintiff no reasonable warning of the approach in the usual way, by ringing the bell or blowing the whistle, and if the noise of the sudden approaching train passing over the road scared the plaintiff’s horse and caused him to run away, throwing the plaintiff out of his buggy, and if the negligence of the defendant, through its servants or agents, by failing to give such warning, was the proximate cause (that is, the direct and efficient cause) of his injuries, without which his injuries would not have occurred, then the defendant company is liable, and your verdict should be for the plaintiff.”

It is conceded by counsel on both sides that the question thus presented by the charge of the trial judge is one of first impression in this state. It is conceded by counsel for the company that, under the authorities, if this were a grade crossing, the company would be operated with some common-law duty to warn travelers of its approach, but claimed that no such duty applies when the traveler is not compelled to pass over the railroad track, but beneath it.

As illustrating the position of counsel for the company, the case of *Favor v. Boston, etc., R. Co.*, 114 Mass. 350, 19 Am. Rep. 364, is cited, in which the court used this language, viz.:

“Where a railroad crosses a highway at grade, the law imposes upon it the duty of giving notice to travelers of the approach of its trains. This rule applies because at grade crossings the traveler on the highway and the railroad enjoy a common privilege on the highway itself, and each must use such privilege with due regard to the safety and rights of the other. And as a train of cars is a dangerous power when in motion, and capable of doing great injury, a high degree of care is demanded of the railroad in controlling it, and some notice of its approach to the

Louisville & N. R. Co. v. Sawyer

highway is required both by the rules of the common law and by statute. But where a railroad crosses a highway by a bridge, it does not, in common with the traveler, have any privilege in or use of the highway itself. Though the track and the highway are near and adjacent to each other, they are entirely distinct and separate. The railroad has no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveler. It has the right to use its roadbed and bridge as a railroad may use them—by running its trains at the common rate of speed, accompanied by the usual noises attendant upon such exercise of its rights. It is not bound by law to notify the traveler of its intention to use its bridge in the ordinary and usual manner.”

In *Ryan et ux. v. Pa. R. Co.*, 132 Pa. 304, 19 Atl. 81, it appeared that plaintiffs were driving under defendant's railroad upon a public street, when a train crossing overhead frightened their horse so that it became unmanageable and ran away, inflicting serious personal injuries, and resulting in the death of one of the children. The court said:

“The defendant company was operating its road in a lawful manner. No defect was shown in the construction of the road. On the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorizing it. The sight and sound of a moving train always have a tendency to frighten horses. In this case the fright was occasioned by sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The defendant company has, under all the authorities, the right to operate its road in a lawful manner; and, when it does so without negligence and without malice, is not responsible for injuries occasioned thereby.”

In *Ransom v. Chicago Railway*, 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718, liability was adjudged against the company for breach of a statute of that state requiring certain precautions to be observed by railroad companies before crossing any highway; causing a horse to run away near a crossing, and inflicting personal injuries on plaintiff's wife. The court said:

“There is no statute, and we are aware of no common-law rule, which, under such circumstances, requires railroad companies to observe these precautions to avoid accident. If, therefore, the defendant is liable in this action, it is so because it failed to comply with the requirements of the statute prescribing its duty when its train approached the crossing of the highway.”

In *Jenson v. Chicago, etc., Railroad Company*, 57 N. W. 359, 22 L. R. A. 680, the court said as follows:

“It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some

Louisville & N. R. Co. v. Sawyer

horses going under the bridge, or being near it at the same time, might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make less noise going over slowly than faster. What degree of noise must it make, to frighten horses? * * * As to ringing the bell and blowing the whistle, they are only required, if at all, in order to avoid frightening horses, and, with that view, to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on and take his chances, for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage."

The cases just mentioned comprise all those cited by counsel for the company in support of their contention that the charge of the circuit judge was erroneous. The authorities holding the contrary doctrine will now be considered. Rapalje & Mack, in their Digest of Railway Law, vol. 3, § 92, state the law thus:

"Independently of the statute, it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger." Citing *Chicago & A. R. Co. v. Dillon*, 123 Ill. 750, 15 N. E. 181, 5 Am. St. Rep. 559; *Pa. Co. v. Krick*, 47 Ind. 386; *Winstanley v. Chicago, M. & St. P. R. Co.*, 72 Wis. 375, 39 N. W. 856.

"The absence of a statute requiring the ringing of a bell or the sounding of a whistle in approaching highway crossings will not excuse the company for a failure to do so under all circumstances. Where a view of approaching trains is obstructed, or it is impossible or very difficult to hear them, and in similar cases, it is clearly the duty of the company to give such signals, although not required by the statute." Citing authorities.

"Whether, in a given case, ordinary care requires the giving of such signals, is a question for the jury." Citing *Indianapolis R. Co. v. Hamilton*, 44 Ind. 76.

Again, the same author, at section 97, vol. 3, says:

"Where the view of an approaching train is obstructed, though the company is not required by the statute to sound a whistle or ring a bell when its train approaches a highway, yet, where such appliances are available, the failure to use them is negligence." Citing cases.

"Where an approaching engine is concealed from the view of persons approaching a highway crossing at a place of much travel, regardless of the statute, the duty of the company to operate its train at a moderate rate of speed, and to give the usual signals of its approach, is more imperative than at a place of less danger." Citing authorities.

Again, the same author, at section 154, vol. 3, says:

"The provision of the New York act of 1850, § 39 [page 232, c. 140], prescribing a penalty for running a locomotive past high-

Louisville & N. R. Co. v. Sawyer

way crossings without giving signals, applies to a crossing where the track is carried over the highway on a bridge." Citing *People v. N. Y. Central R. Co.*, 13 N. Y. 78, affirming 25 Barb. 199.

"It is as much the duty of a company to give notice of the approach of trains where highways pass under or over the track as where they cross at grade, if danger is likely to result to persons or property from a failure to do so." Citing *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346.

This latter case seems to be the leading authority relied on by counsel for the plaintiff below, and we shall therefore proceed to notice it in extenso.

The facts of that case are that the public road crossed the railroad by a bridge 19 feet above the track. The plaintiff was traveling along this road, and while driving over the bridge an express passenger train passed under it, whistling as it passed, at which his horse took fright and ran away, overturning the carriage and throwing plaintiff out, in consequence of which he was seriously and permanently injured. It appeared that a mill on the east side of the public road obstructed the view of the railroad to some extent. About 100 rods east of the bridge there was a whistling post, and it was usual for trains going west to sound an alarm whistle as they passed, but at the time of the accident the whistle was not sounded until the train was passing under the bridge. The court, in the midst of its opinion, said:

"The degree of care demanded of the company in running its train depended on circumstances, and whether it observed due care in approaching the bridge, or was guilty of negligence in not sounding an alarm whistle, was a question which properly belonged to the jury to determine. * * * If there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning in order that it might be avoided. * * * Whether, therefore, the company exercised proper care and diligence in running the train in order to prevent injury to the persons and property of those who were lawfully on the public road and in the vicinity of the crossing, was a question for the jury."

It was further insisted in that case that the company would not be liable for failing to sound the alarm whistle except at points on the road where injury might result to persons on the track at road crossings at grade and stations. The court held that whether it is the duty of the company to give notice of the approach of its trains at any point on the road depends altogether upon circumstances. Where there is no reasonable apprehension of danger, no such notice is required. But if danger to the person or property of others may be reasonably apprehended or is likely to result from the running of its trains without giving such

Louisville & N. R. Co. v. Sawyer

notice, then it is the duty of the company to give it, and its omission is negligence. The court approved the charge of the circuit judge in saying that it was the duty of the company to give notice wherever danger may result to persons rightfully traveling on a public road that crosses the track, whether at grade, or over or under the railroad, where danger would be the consequence of want of notice.

It will be observed that the substance of this opinion is that, whether or not it was negligence on the part of the company to fail to warn travelers of the approach of the train to a public crossing, was a question for the determination of the jury, in view of all the surrounding circumstances, and it was immaterial whether the railroad crossed the public road at a grade, or over or under the public road.

Another case very much relied on by counsel for plaintiff below is *Rupard v. Ches. & O. R. Co.*, decided in 1889 by the Court of Appeals of the state of Kentucky, and reported in 88 Ky. 280, 11 S. W. 70, and in 7 L. R. A. 316. In that case it appeared that the wife of plaintiff, while riding horseback on the public road at a point where the railroad crosses said road on a high trestle, was thrown from her horse in consequence of his fright from the noise of the train as it passed over the trestle. The ground of liability asserted in that case was the failure of the company to give notice of the approach of the train to the crossing. The court, in considering the liability of the company, repudiated the doctrine laid down in *Favor v. Boston R. Co.*, *supra*, in which a distinction was drawn between the duty of the company to warn travelers of the approach of a train to an overhead bridge or to a grade crossing. In the Kentucky case the court held that it is the duty of a railroad company, where a train crosses a public highway on a trestle, and there is danger of catching a traveler thereunder unawares, and frightening the horse that he is riding or driving, to give some timely warning of the approach of the train to the crossing. The court, in its opinion, while disagreeing with the conclusions reached by the court in *Favor v. Boston R. Co.*, *supra*, approved the principles enunciated in *Pa. R. Co. v. Barnett*, 59 Pa. 263, 98 Am. Dec. 346.

It was further held in that case that the question of negligence in failing to give notice should be left to the determination of the jury. Counsel for plaintiff in error cites the case of *Farley v. Harris*, reported in 40 Atl. 798, and decided by the Supreme Court of Pennsylvania in 1898, which case, it is claimed, is a modification of the rule laid down in *Railroad v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346. In that case it appeared that the plaintiff was crossing an overhead bridge, when his horse became frightened, ran away, and injured the plaintiff. The grounds of recovery alleged in that case were two: (1) That the whistle had been negligently sounded when the locomotive was immediately under the bridge; and (2) that no whistle had been sounded by the locomotive on approaching this overhead bridge.

Louisville & N. R. Co. v. Sawyer

The court said that the rule applicable to grade crossings—that it is negligence in railroad companies not to give warning on approaching them—has no application to under and over crossings at every street crossing in a city. The court, in concluding its opinion, says that the cases cited by the appellant (*Railroad Company v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, and other cases) are all applicable to a different state of facts than are presented here.

A careful examination of *Farley v. Harris*, supra, will show that the gravamen of the action was the blowing of the whistle when Farley was on the bridge, and the locomotive was directly beneath it. The proof was that the fright of the horses was caused solely by the blasts of the whistle when Farley was in the middle of the bridge. It is true that in the midst of the opinion the court said that the rule applicable to grade crossings has no application to under and over crossings at every street crossing in a city. "In fact," continued the court, "such crossings are constructed on the theory that, by adopting them, travel is unobstructed, and danger to travelers on parallel and cross streets is lessened by the absence of the screams of steam whistles necessary to give warning at grade crossings." The court then said that *Railroad v. Burnett*, 59 Pa. 259, 98 Am. Dec. 346, and other cases cited, are all applicable to a different state of facts, and concludes by saying: "Our decision is based solely on the circumstance of an accident at a properly construed overhead bridge at one of the many street crossings of a steam railroad in a city." After an examination of all the authorities cited, we think the true rule deducible therefrom is that, if the place is dangerous, then the company is operated with the duty of warning travelers on the highway of the approach of its trains, but whether the place, as a matter of fact, is dangerous, is a question for the determination of the jury. The law imposed no absolute duty upon the company to give notice at this particular crossing. That duty was only required, as matter of law, in the event the jury should find that danger was to be reasonably apprehended at this conjunction of underpass and overhead bridge. The charge of the trial judge in this case made the duty of the company absolute to give warning of the approach of the train to the crossing. Said the court: "It was the duty of the defendant company to give plaintiff reasonable warning of the approach of the train by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track." There was no such absolute duty resting upon the company either at common law or by statute, but its duty in this respect was entirely dependent upon the question of fact whether the place was dangerous. The charge of the court should have been so formulated as to leave to the determination of the jury the dangerous character of the place, as the predicate for the application of the principle of law announced. For the error indicated, the judgment is reversed and the cause remanded.

FIREMEN'S INS. CO. et al. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, April 4, 1905.)

[50 S. E. Rep. 452.]

Evidence—Train Sheets—Hearsay.—Where, in an action against a railroad for burning cotton, it became material to show at what time defendant's wrecking train reached a certain station on the day in question, the dispatcher's train sheet for that day, kept in the usual course of business, on which the dispatcher testified that he marked the time of the arrival and departure of the train as telegraphed to him by the operator at the station, was not objectionable as hearsay.

Fires Set by Locomotives—Presumption of Negligence—Instructions.*—In an action against a railroad for burning cotton, a request to charge that if the jury found that the fire originated from sparks from defendant's engine the presumption was that the sparks were negligently emitted, and that such presumption arose whether the fire started on the outside or inside of the building containing the cotton, was properly refused; the court having charged that if the fire originated from sparks from defendant's engine the presumption was that the sparks were negligently emitted, and that if defendant had failed to rebut such presumption they should find that the cotton was burned by reason of defendant's negligence.

Appeal from Superior Court; Wake County; Long, Judge.

Action by the Firemen's Insurance Company and others against the Seaboard Air Line Railway. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Plaintiffs alleged that on the 19th day of October, 1902, certain cotton, upon which plaintiff companies had issued policies of insurance, was burned by the negligence of the defendant's agents and servants; that, by reason of the destruction of said cotton, plaintiffs were compelled to pay the value thereof; that the owners of said cotton transferred and assigned to the plaintiffs all rights of action which they had against the defendant company for the negligent burning thereof. Defendants denied the material allegations in the complaint. The parties went to trial upon the following issues: "(1) Was the property of the Hamlet Ice Company insured by the plaintiffs, as alleged in the complaint. at the time it was burned? Answer. Yes. (2) Was the said property burned by the negligence of the defendant company, as alleged in the complaint? Answer. No." From a judgment upon the verdict the plaintiffs appealed.

Busbee & Busbee and *Douglass & Simms*, for appellants.
Day & Bell and *T. B. Womack*, for appellee.

CONNOR, J. (after stating the facts). In the trial of this cause it became material to show at what time the defendant's wrecking train No. 371 reached Hamlet, the station on defendant's road at which the cotton was burned. Defendant introduced one

*See foot-notes appended to *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

Fireman's Ins. Co. v. Seaboard Air Line Ry

C. Lane, who testified that he was employed by the defendant road as train dispatcher on 19th October, 1902; that it was his duty to keep a record of the arrival and departure of all trains at all telegraph stations; that the record was made and kept on the train sheet; at the time trains arrived at and left stations, the operator at such stations notified the dispatcher, who immediately recorded on the sheet the time as it was reported to him; that such sheet constituted a record of the arrival and departure of all trains; that he governed the movements of trains by such record; that on the 19th of October, 1902, the official report was sent him, and that he immediately recorded thereon the time of the arrival of the extra train, which was the wrecking train at Hamlet of that date; and that he had the record before him. The defendant then offered the record in evidence, for the purpose of showing the time of the arrival of the wrecking train at Hamlet, which witness McDonald testified was taken charge of by shifting engine No. 371 on its arrival. (Objection.) The court ruled that the witness could refresh his recollection by an inspection of the record, enabling him to speak touching his own acts at the time with regard to the matter under inquiry, which at that time ruled out the declaration which any other agent of the company made to him at the time, by wire or otherwise. The witness stated that he could not state of his own personal knowledge the time at which the wrecking train arrived at Hamlet. The court admitted the record in evidence, showing the entries made by witness of statements made to him by wire from the agent of the defendant at Hamlet as to arrival and departure of said wrecking train, to which plaintiff duly excepted. Defendant also introduced one J. W. Hunt, who testified that he was employed by defendant company as conductor, and that as such he ran wrecking train on October 19, 1902, from Raleigh to Hamlet; that it arrived at Hamlet at 12:37. Witness is then shown a book which he identifies as a register, showing the time of arrival, which he says is kept at Hamlet; that it was his duty to register the arrival of the train, and that he did register it on that day. He identifies the entry in his own handwriting: "Extra train. Time arrival, 12:37 p. m." Signed by him, and also by engineman. This last record was offered by defendant in corroboration of witness Hunt, and the court admitted it for that purpose, so instructing the jury.

It is contended by the plaintiffs that the "train sheets" are not admissible, because, while containing entries made by the train dispatcher in the usual course of business, he had no personal knowledge of the truth of the statements recorded; that he simply recorded information derived from the operator at Hamlet, a hundred miles or more distant from Raleigh. This, they say, is but hearsay. The defendant, on the other hand, contends that the entry made by the train dispatcher, although based upon information derived from the operator, by reason of the circumstances under and the manner in which the information was com-

Fireman's Ins. Co. v. Seaboard Air Line Ry

municated, is surrounded by all possible safeguards against error, uncertainty, or falsehood, and therefore comes within the exception to the general rule excluding hearsay evidence. The question is of first impression in this state. We have given it careful and anxious consideration, desiring to make no departure from the well-settled principles of the law of evidence or the decisions of this court, at the same time recognizing and keeping in view the duty of the court to make diligent effort to find in those general principles such safe and reasonable adaptability that in the changing conditions of social, commercial, and industrial life there may be no wide divergence in the decisions from the standards by which men are guided and controlled in important practical affairs. The law of evidence, based upon certain more or less well-defined general rules evolved from experience, has been molded by judicial decision and legislative enactment into a system having for its end and purpose, and believed to be adapted to, the discovery of truth in judicial proceedings. Mr. Greenleaf says: "In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is that there is no reasonable doubt concerning them." Prof. Thayer says, "The law of evidence is the creature of experience rather than logic." "The distinctions of the law are founded on experience, not on logic. It therefore does not make the dealings of men dependent upon mathematical certainty." Holmes, Com. Law, 156. "It is no doubt true that to a very great extent the law of procedure, as well as the primary law, is founded, not on the experience of isolated persons, but the general experience of men engaged in the business and vocation of life." 1 Elliott, § 3. The courts early adopted, and have at all times rigidly adhered to, the rule that witnesses, in testifying, must be confined to that which is within their personal knowledge, and that which is but hearsay must be excluded. 1 Greenleaf (16th Ed.) 98; 1 Elliott on Ev. 215. The wisdom of this general rule, and the reason upon which it is founded, are obvious, and require no vindication or discussion. The courts, however, soon found from experience that unless exceptions were made to the general rule it would be impossible in many cases to establish the truth; that legal rights would be sacrificed, and wrongs be without remedy. Judge Elliott says: "As already stated, it was conceived originally that witnesses should always be present, but this was found impracticable. In consequence, the general rule has become honeycombed with so-called 'exceptions.' The grounds of making these exceptions differ as do the different exceptions. The ground as to some is that the hearsay is rendered necessary by the difficulty of other proof; as to others, the ground is that, owing to the circumstances under which certain declarations were made, some guaranty of their reliability is

Fireman's Ins. Co. v. Seaboard Air Line Ry

furnished other than the mere fact of their having been made; that is, the circumstances add peculiar weight to this evidence, and dispense with the ordinary tests of credibility." 1 Elliott, 320. The general and well-recognized exceptions are stated in Elliott on Ev. 331; 1 Greenleaf, 114. Prof. Wigmore says that the reasons upon which the exceptions are based are "circumstantial guaranty of trustworthiness and necessity." 11 Wigmore, Ev. § 1420. The principle, with its limitations, is well stated by Jessell, M. R., in *Sugden v. St. Leonards, L. R.* 1 Pro. Div. (1875-76) 154 (241). He says: "Now, I take it, the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exception was that very difficulty. In the next place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be disposed to favor. Lastly—and this appears to me one of the strongest reasons for admitting it—the declarant must have had peculiar means of knowledge, not possessed in ordinary cases."

Among the exceptions to the general rule we find "entries and declarations of third parties made in the regular course of duties or business." Such entries are of two kinds: First, those made by the entrant respecting a transaction conducted by or matter known to him personally, in which no other person has taken any part. Second, those made by the entrant upon information communicated to him by some other person acting in the line of his duty to make report to him. The entries made by the train dispatcher fall within this class. It is undoubtedly the general rule that, if the entrant and the person making the report upon which the entry is made are both living and available, they should be produced to testify to the truth of the subject-matter of the entry; that if one be living and available, and the other dead or unavailable—that is, insane or beyond the process of the court—the entry may be introduced upon the testimony as to its authenticity of the living, available person. Can the entry be admitted when, as in the case before us, the entrant is living, and the person upon whose report the entry is made is not produced nor his absence accounted for? Mr. Greenleaf, referring to the decisions of the courts in respect to the admissibility of this class, says: "Other courts * * * admit them [the entries] without accounting for the original observer, on the sound consideration that it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transactions." 1 Greenleaf, 120a. He says that other courts refuse to permit such entries to be introduced. Judge Elliott, quoting the language of Mr. Greenleaf, says: "We are inclined also to agree, in the main, with the writer quoted in the last pre-

Fireman's Ins. Co. v. Seaboard Air Line Ry

ceding section, but not entirely without qualification. It may be—although, as shown by the authorities there cited, there is sharp conflict among the authorities—that such entries are admissible in a proper case, when duly authenticated, on proof that the informant knew the facts or properly reported them, even though he is not put upon the stand, especially if he is unavailable; and there are authorities looking very decidedly in that direction in addition to those referred to in the preceding section.” Citing *Meyor v. Brown*, 130 Mich. 449, 90 N. W. 285; *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497; *Donovan v. R. R.*, 158 Mass. 450, 33 N. E. 583. Prof. Wigmore, after a very interesting discussion of the question in its several aspects, says: “The conclusion, then, is that, when an entry is made by one person in the regular course of business, recording an oral or written report made to him by one or more persons in the regular course of business of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, * * * provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employer affect the trust that is given to such books. It would seem that expedients which the whole business world recognize as safe could be sanctioned, and not discredited by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who, as attorneys, have already employed and relied upon the same methods. In short, courts must here cease to be pedantic, and endeavor to be practical.” We have made these extracts from the works of three standard American authors on the law of evidence to show the trend of thought and opinion upon the admissibility of entries falling within the class under discussion. An examination of the decided cases discovers a conflict of authority. In *Fielder v. Collier*, 13 Ga. 495, the action was assumpsit for balance due on account. The defendant shipped to plaintiffs for sale, as commission merchants, cotton upon which they obtained advancements. The cotton, when sold, brought less than the amount advanced. The action was brought for the difference. For the purpose of showing the items making up the account, including expenses of selling, etc.,

Fireman's Ins. Co. v. Seaboard Air Line Ry

the plaintiffs offered to show a transcript from their books (this, under the rule of practice in that state, was admissible, if at all, as the original). The testimony was, upon objection, excluded. Upon appeal, Lumpkin, J., said: "Shall this proof be received, or shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the subagents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to procure? * * * They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. After the lapse of a very brief period, the clerks themselves could only call to mind what had been done by referring to their entries and memoranda."

The exact question is presented and decided in *Donovan v. R. R.*, 158 Mass. 450, 33 N. E. 583. The defendant offered, for the purpose of showing the position of a train at a certain time, the train sheets kept by the dispatcher, with the testimony of the person who made them. The facts are singularly like those before us in respect to the manner in which the entries were made. This may be explained by the fact that all railroads necessarily have some approved system of controlling the movement of trains and keeping a record thereof, using the telegraph offices on their line of road as the medium for communication. It would be impossible, without the most disastrous results, to do otherwise. Barker, J., says: "The failure to produce the East Summerville operator is relied upon by the plaintiff as one ground for his contention that the entries were not shown to be competent evidence." He proceeds to note cases holding inadmissible certain shopbook entries, and says: "But no entries were transferred to the dispatcher's sheet from the sheet kept at the East Summerville Station. As telegraphic messages are read by sound, as well as automatically recorded in symbols, these entries stand upon the same footing as if made from oral statements uttered at the indicated station and audible in the dispatcher's office." The reasoning of the learned judge is so satisfactory to our minds that we quote his language: "It is clear that the sheet was worse than useless if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry, when made, should be true, and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the train at the station and telegraphed the information to the dispatcher's office, or the person who there received the messages and made the entries on the sheet, had any interest to mistake the facts or

Fireman's Ins. Co. v. Seaboard Air Line Ry

to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum, and every step by which the information spread upon it was gathered, transmitted, and entered was an act performed by some person in the line of his duty and in the usual course of his employment, under a sanction tending to make his statements true, and these acts were so connected with and dependent upon each other as to form parts of one transaction." The case most strongly relied upon by the plaintiffs, sustaining their exception, is *R. R. Co. v. Noel*, 77 Ind. 110, 121. The character of the entries do not very clearly appear. The court cites no authorities, and disposes of the question quite summarily. It is simply stated that the defendant offered as evidence "the entries in books." It does not appear how they were authenticated, by whom, or upon what basis they were made. The case is noticed by the Massachusetts court as being "entries possibly similar." The decision is not very satisfactory as an authority, because of the meager statement of the facts. Many of the cases cited by the plaintiffs are based upon construction of the "book debt laws" of the states. Some of them do not come within any of the exceptions to the general rule. We find no case directly in point, or giving us much aid in our Reports. In *Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522, it was held that market reports published in newspapers, when the information was gathered from reliable sources, were admissible.

The record made by one appointed for that purpose by the signal service bureau of the state of the weather held admissible. *Knott v. R. R.*, 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321. Prof. Wigmore suggests that when an entry is made in the usual course of business, based upon reports made by one whose duty it is to make such report, but who is not required to make and keep any record of the transaction, the entry so made is admissible upon the ground of necessity, growing out of the fact that it is not to be expected that the person making such report would remember the fact reported, and that he is therefore unavailable in a legal sense. It is not to be expected that an operator, who reports to the dispatcher the time of arrival and departure of a number of trains daily, could undertake to testify from memory the hour and minute of each arrival or departure. He has no duty imposed upon him to do so. If he did undertake to testify, as in this case, three years after the event, but little credence would be attached to his testimony. For practical purposes, he is as essentially unavailable as if dead or insane. We are of the opinion that, applying either test, trustworthiness or necessity, the entries made on the train sheets were admissible. It has occurred to our minds that possibly the train sheet is admissible as a quasi public record. It is true that neither of the persons making it are sworn officers, yet it is well settled, and now recognized by all courts, that common carriers in the operation of their trains are discharging a public duty, with many of the

St. Louis Southwestern Ry. Co. v. Stringer

incidents attaching to public agencies. It would seem not unreasonable that courts should give to their records, made in the discharge of such duty, and meeting the other requirements of public records, the same recognition as is given to such records. It is not easy to see why this entry is not surrounded by the same "circumstantial guaranty of trustworthiness" as an entry made under similar conditions by a clerk in a public office. We do no more than suggest this view. The exception must be overruled. We deem it proper to say that in nothing said herein do we wish to be understood as opening the door to other testimony than that permitted by the statutes in force in this state in regard to book debts. Code, §§ 591-593; Acts 1897, p. 659, c. 480. The plaintiffs requested his honor to charge the jury: "That, if the jury shall find from the evidence that the fire originated from sparks from an engine of the defendant railroad company, the presumption is that the sparks were negligently emitted (and such presumption arises whether the fire started on the outside or inside of the compress building)." This was declined. His honor, at the request of the plaintiffs, charged the jury: "That, if the jury shall find from the evidence that the fire originated from sparks from an engine of the defendant railroad company, the presumption is that the sparks were negligently emitted. And, if the jury shall further find that the defendant railroad company has failed to rebut such presumption, the jury should answer the second issue 'Yes.'"

We find no error in the refusal of the court below to give the third special instruction, and think that the fourth instruction given presented to the jury the law governing the defendant's liability, if they found that the defendant company burned the cotton. We have examined the entire record with care. His honor's charge is clear, full, and correct. It would seem that the real question around which the controversy was fought out and decided was whether the cotton was set fire to and burned by the defendant's engine. The judgment must be affirmed.

Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. STRINGER.

(Supreme Court of Arkansas, March 11, 1905.)

[86 S. W. Rep. 280.]

Railroads—Injury to Stock—Liability—Exemption—Contract—Construction.—A contract between a railroad and a person for whom it agreed to lay a side track to his mill, releasing the railroad from all liability for injury to stock killed on the tracks of the railroad at the spur track or upon the same, has no application to stock killed on the main line near the spur.

Battle, J., dissenting.

Appeal from Circuit Court, Craighead County, Jonesboro District; Allen Hughes, Judge.

St. Louis Southwestern Ry. Co. v. Stringer

Action by R. L. Stringer against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Saml. H. West and *J. C. Hawthorne*, for appellant.

Eugene Parrish, for appellee.

HILL, C. J. Stringer sued the railroad company, charging that in the operation of one of its trains it negligently killed a horse belonging to him. The railroad company denied negligence, and pleaded a contract which it claimed exempted it from liability. The court excluded the contract, and it is admitted that otherwise the case was properly submitted to the jury, and that there is evidence to sustain the verdict in favor of Stringer for the value of his horse. The only question, therefore, for determination, is the applicability and effect of the contract in question. The railroad agreed to lay for Stringer a side track or spur from its line to his sawmill, and a written contract was entered into between them which contained this clause: "The said second party hereby further stipulates and agrees that in consideration of the agreement herein contained, to be kept and performed by the said Railway Company, that they will fully release, indemnify and hold the said Railway Company harmless from all liability or claims for damages for killing, crippling or maiming any cattle, horses, mules, sheep, hogs, or other live stock belonging to said second party, or to their employees, which may be killed, crippled or maimed by said Railway Company on their tracks at the said spur track or siding or upon the same." The appellant, in its cross-examination of Stringer, proved that the horse was killed at a crossing 30 feet north of the spur. "That is to say, that the spur did not connect with the main line for 30 feet south of where the horse was killed." This evidence was uncontroverted. The train which killed the horse was not using the spur track, but was going south on the main line at a speed of 20 miles an hour, and the presence of the spur track or its use did not enter into the circumstances causing the killing of the horse. The circuit court excluded the contract on the ground that it was void as against public policy, and that question is discussed here. The court does not determine that question, because, if the contract was valid, still its exclusion in this case was proper. The contract covers only damage to stock "on their tracks at said spur or siding or upon the same." This killing did not occur at the spur, nor on the spur, and was in no way connected with the use of the spur. While it was near the spur, yet, if it had been 100 feet or 500 feet, it would still have been near the spur, and there is no point to draw the line, other than the line the parties drew themselves in the contract. There being no causal connection between the spur track and the killing of the horse, there is no reason to extend the contract to cover the injury unless its terms require it. "The preposition 'at,' when used to denote local position, may mean 'in, on, near, by, etc., according to the con-

Gulf & S. I. R. Co. v. Ellis

tract'; denoting usually a place conceived of as a mere point." Rogers v. Galloway College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636. While cases construing this preposition are not of much value, as they necessarily turn on the context and connection in each instrument, yet, for what value they are, they support the conclusion reached herein. Stewart v. Patrick, 68 N. Y. 450; Proctor v. Andover, 42 N. H. 348, 362; Davis' Adm'r v. C. & O. Ry. (Ky.) 75 S. W. 275; Words & Phrases Judicially Construed, vol. 1, p. 593 et seq. The horse was not killed at or on the spur track, and the contract did not apply.

The judgment is affirmed.

BATTLE, J., dissents.

GULF & S. I. R. Co. v. ELLIS.

(Supreme Court of Mississippi, April 10, 1905.)

[38 So. Rep. 210.]

Railroads—Construction of Cattle Guards.*—Where a railroad enters a pasture comprised of about 150 acres, belonging to one person and used as one tract, and constructs sufficient cattle guards where it enters and leaves the pasture, it is not its duty to erect other cattle guards at a place in the pasture where it has, for the convenience of the owner thereof, constructed a crossing for the passage of cattle over the railroad track.

Appeal from Circuit Court, Rankin County; Jno. R. Enochs, Judge.

"To be officially reported."

Action by W. C. Ellis against the Gulf & Ship Island Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

McWillie & Thompson, for appellant.

S. L. McLaurin and *A. G. Norrell*, for appellee.

WHITFIELD, C. J. There may be cases in which it would be the duty of a railroad company to construct and maintain more cattle guards than one where the railroad enters upon, and one where the railroad makes its exit from, an inclosed tract of land. The statute does not specify the number. There might be a very large body of land, lying on both sides of a railroad track, many thousand acres in extent, the property of one owner; and this body of land might be subdivided into half a dozen cultivated farms, and interspersed between them might be half a dozen pastures, and the cultivated land might be divided from the pastures by cross-fences intersecting the railroad. In such

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to cattle guards, see foot-note appended to *Campbell v. Iowa Cent. Ry. Co.* (Iowa), 12 R. R. R. 601, 35 Am. & Eng. R. Cas., N. S., 601.

Northern Cent. Ry. Co. *v.* State

cases, doubtless, it would be the duty of the railroad company to construct and maintain proper cattle guards where each of such cross-fences intersected the railroad track. Of course, this qualification must attach even in such cases; that is to say, that the subdivision should be made in good faith, and not simply to make a case for penalties against a railroad company. But the difficulty with appellee's case is that no such state of facts is shown by this record. So far as this record discloses, there is just one body of land involved, 150 acres in extent, around where the railroad enters upon and leaves the inclosed land. And the whole of this land on both sides of the railroad track is pasture land. Somewhere about the middle of the pasture, the railroad, for the convenience of the appellee, constructed a crossing, never used as a wagon road, but intended simply for passage of the cattle from one part of the pasture to the other over the railroad track. At the place where this crossing was, the railroad also erected cattle guards, and it is the northernmost one of these two interior cattle guards which is complained of here as insufficient. So far as this record discloses, the northernmost and southernmost cattle guards are sufficient. There is no proof whatever that the cattle guard at the extreme northern end of the pasture is not entirely sufficient. Judging from the brief of appellee, it would seem that the purpose was to have shown this cattle guard to have been insufficient, but there is no such proof. Counsel for appellee insist that the declaration must show what is claimed. Granted; but the declaration must be supported by proof, and the only proof of any insufficiency in any cattle guard in this case is as stated above.

Reversed and remanded.

NORTHERN CENT. RY. CO. *v.* STATE, to Use of GILMORE.

(Court of Appeals of Maryland, Jan. 13, 1905.)

[60 Atl. Rep. 19.]

Accident at Crossing—Questions for Jury.—In an action against a railroad for the death of a person in a crossing accident, evidence examined, and whether the defendant was guilty of negligence, or the deceased of contributory negligence, held questions for the jury.

Same—Signals—Negative and Affirmative Testimony.*—Testimony of witnesses that they did not hear the bell of an engine ring as it approached a crossing is not of such probative value as positive affirmative evidence that it was so rung; but this rule does not authorize the jury to entirely disregard the evidence of a negative character.

*As to the comparative weight of positive and negative testimony in regard to whether crossing signals were given, see foot-note appended to *Chicago & A. Ry. Co. v. Pulliam* (Ill.), 13 R. R. R. 755, 36 Am. & Eng. R. Cas., N. S., 755; *St. Louis & S. F. R. Co. v. Brock* (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613; foot-notes appended to *Chicago, etc., Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584.

Northern Cent. Ry. Co. v. State

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Suit by the state, to the use of Alexander Gilmore, father of John Gilmore, deceased, against the Northern Central Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Shirley Carter and John J. Donaldson, for appellant.

William Colton, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the court of common pleas of Baltimore City in favor of the equitable appellee for damages for the death of his son as the result of an accident at a railway crossing. There is but one bill of exceptions in the record, and that is from the court's rulings on the prayers. The evidence as to the locus in quo of the accident and of the situation of the parties involved in it down to a few minutes before its occurrence is uncontradicted, but as to the circumstances of the accident itself there is the most positive conflict of testimony. The accident occurred at the intersection of Eastern avenue, which runs east and west, and the tracks of the appellant, which run north and south in the bed of Ninth street. At that point Eastern avenue is 70 feet wide and Ninth street, on which the railroad tracks run, is 100 feet wide. There are two main tracks of the railroad in the middle of Ninth street, and there are two freight tracks to the west of the main ones, making in all four tracks occupying about 40 feet in width of the bed of the street. On each side of this set of tracks there is a pair of safety gates across the bed of Eastern avenue, which are operated from a watch box at the south end of the gates on the east side of the tracks. Any one standing on the westernmost of the four tracks at its intersection with Eastern avenue has a clear view southerly for a mile, if no cars are on that track. At the time of the accident a row of box cars standing on that track and extending north to the line of the south side of Eastern avenue greatly shortened the view southerly, but even then, by leaning forward or taking a step or two easterly, the full length of the view would have been restored. On the day of the accident John Gilmore, aged 18 years, the son of the equitable plaintiff, was engaged in driving a one-horse coal cart. About 2 o'clock in the day, while he was going easterly on Eastern avenue across the railroad tracks with his cart loaded with a ton of coal, the cart was struck on the south side by one of the appellant's engines going north, and thrown upon his feet, and such injuries were inflicted upon him that he died therefrom. The accounts as to the precise method of the occurrence of the collision between the engine and the cart are very conflicting. Thomas Kenny testified that he was standing in the doorway of his residence at the

Northern Cent. Ry. Co. v. State

northeast corner of Eastern avenue and Ninth street at the time of the accident, and saw it happen. He said that Gilmore, riding upon his cart, and immediately followed by a similar cart, was going east on Eastern avenue, and came to the gates on the west side of the tracks, and found them down. After a few minutes the gateman, who was on the east side of the tracks, raised the gates, and beckoned for the carts to come over the crossing, and that Gilmore thereupon jumped down from his cart, took his horse by the head on the north side, and started to cross the tracks. When crossing the second track the cart was struck on the south side by the appellant's engine and pushed over on to the boy's feet. The witness said that he, standing in his doorway, saw the smoke and smokestack of the engine over the box cars, but could not see the engine before it came out from behind the cars; nor, in his opinion, could the boy who was injured see the engine from his position leading his horse. Witness heard no bell rung nor signal given from the engine as it approached, and felt sure that from the position he occupied he would have heard the bell if it had rung. He was standing only about 20 feet from the cart when it was halted by the western gate being down. Henry Dean, the driver of the second cart, corroborated Kenny's testimony as to the facts throughout, and said that he heard no bell rung or whistle blown from the engine. Charles Miller, who was present at the time of the accident, also corroborated Kenny's testimony as to all of the facts of the occurrence, except that he does not mention the circumstance that Gilmore was riding on the cart as he first approached the crossing, nor does he say anything pro or con in reference to signals from the engine as it approached. Henry Ruth, a cart driver, testified that he was familiar with the crossing, and that he was on the spot at the time of the accident. That by reason of the condition of the streets at the crossing it was necessary for the driver of a loaded coal cart to get down and take his horse by the head when crossing the tracks. "That the engine didn't ring any bell or blow any whistle there. There was nothing at all done; only after the boy was in danger, and could not get out of it the gatekeeper tried to make him come back. It had him dead, then, and he could not get out of the way." The witness was standing by Mr. Kenny's saloon, and saw Kenny standing in the door. On the other hand, James McGinness testified for the defendant that he was an eyewitness of the accident; that as Gilmore came down Eastern avenue toward the railroad crossing, he was beating the horse, and causing it to plunge violently, and just as he got to the crossing the trace or something snapped, and the horse went out of the harness. The boy got down from the cart and spent about five minutes fixing the harness. In the meantime the witness heard the bell of the east safety gate ring as that gate came down, and that the western gate against the boy (Gilmore) also came down, and the gatekeeper was growling at the boy, who began to beat his horse again, and it gave a lunge, and just then

Northern Cent. Ry. Co. v. State

the engine came along like a flash and struck the cart. The engineer, fireman, a conductor, and two brakemen, all of whom were on the engine, testified, in substance, that it was coming north on the second track at a speed of about five miles an hour, with its bell ringing, when, the first they saw of the horse, it jumped right in front of the engine, and, although every effort was made to stop the latter, it struck the cart, and shoved it six or seven feet before coming to a standstill. The engineer testified that as he approached the crossing he was standing in his proper position on the right-hand side of the engine in full sight of the gateman, and received no warning or danger signal from him. The gatekeeper testified that he saw the boy coming down Eastern avenue, beating the horse, and driving recklessly, and that when he first saw the engine it was about 600 feet away, and at that time the cart was under the gate on the west side of the tracks, with the horse's feet standing between the two rails of the west track. The witness could not put down the west gates because the cart was under them, and he might have prevented its backing out. He put down the east gates, and called to Gilmore to back out of there, but got no answer or attention from him. Gilmore got off his cart to look at his harness, which was out of order. By the time he got the harness fixed, the engine, which was coming on all the time, was within 25 or 30 feet away, when the horse made a plunge from the west track to the one on which the engine was approaching, and that was the last moment he saw the horse, as the engine got between it and him. He had seen the horse continuously up to that time. The bell on the engine was ringing as it came up the track. The witness, when the boy refused to back off the tracks, called out to him, "As long as you have been staying there that long, damn it, stay another half hour till the engine gets past," but he paid no attention to the call.

The plaintiff offered three prayers, all of which were granted. These prayers were such as have repeatedly received the sanction of this court. In fact, the appellant did not on its brief or in the argument of the case object to the form of these prayers, but insisted on its special exception to the first one on the ground that there was no legally sufficient evidence that any negligence on its part had caused the injury complained of. If the testimony was true of the witnesses who swore that they saw Gilmore wait outside the western gate until the gatekeeper raised the gate and beckoned to him to come across the tracks, and that he then took his horse by the head, and started to obey the invitation of the gatekeeper, and was struck by the engine and injured before he could cross the second track, there was evidence from which the jury were entitled to believe that the defendant was guilty of negligence causing the injury. We have often held it to be the duty, under ordinary circumstances, of a person about to cross the tracks of a steam railway, to look and listen for approaching trains, and, if his view be obscured, to stop, look, and listen; but

Northern Cent. Ry. Co. v. State

here the circumstances testified to by many witnesses were special. According to these witnesses, the boy, on nearing the tracks, respected the danger signal of the closed gates, and stopped his cart until the gates were opened by the man in charge of them, who beckoned him to come across. He then went to his horse's head, and started to lead him across, but was struck by the engine before he had gotten half way over. The gateman himself testified that the engine, as it approached the crossing, was in his sight for 600 feet, and until it struck the cart. He gave no signal to the engineer to stop, and, if the plaintiff's witnesses are to be believed, he invited the boy to cross the tracks. We cannot say, under these circumstances, that there was no legally sufficient evidence of negligence on the part of the defendant or its agents causing the injury. In the *B. & O. R. R. v. Stumpf*, 97 Md. 94, 54 Atl. 978, in discussion the significance of open safety gates at railroad crossings, it was said by this court: "In *North Eastern R. W. v. Wanless*, 7 English and Irish Appeals 12, Lord Cairns held, where it was the duty of the railway to keep the gates closed when any train is approaching, that the fact that they were open 'amounted to a statement and notice to the public that the line at that time was safe for crossing, and was evidence of negligence to go to the jury'; and the same was held in *Stapley v. London & Brighton Ry. Co.*, L. R. 1. Exch. 21; and in *Lunt v. London & Southwestern Ry. Co.*, L. R. 1 Q. B. 277. In the last case Lord Blackburn observed: 'It could make no difference whether the gatekeeper expresses that the road is safe by opening that gate or by word or gestures.' This is the view held in the following cases in this country. *Grand Trunk Railway v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Dolan v. Del. & Hudson Canal Co.*, 71 N. Y. 288; *Glushing v. Sharp*, 96 N. Y. 667; *Palmer v. N. Y. Cent. R. R.*, 112 N. Y. 234, 19 N. E. 678; *Chicago & Rock Island R. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *Rohde v. Chicago & North Western R. R.*, 86 Wis. 312, 56 N. W. 872; *Evans v. Lake Shore & Mich. Sou. R. R.*, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; *Wilson v. N. Y. & N. H. R. R. (R. I.)* 29 Atl. 258; and in many other cases which might be cited. In *Glushing v. Sharp*, *supra*, the court said: "The open gate was a substantial assurance of safety, just as significant as if the gateman had beckoned or invited him to come on, and that an ordinarily prudent man would not be influenced by it is against all human experience.'" In *Stumpf's Case* the injured party testified that he had looked and listened for trains as he approached the open gate and the railroad crossing. In the present case, by granting the defendant's fifth prayer as modified by it, the court instructed the jury: "That the fact that the defendant had placed safety gates at the crossing in question, and stationed a watchman there in charge of the same, did not relieve the deceased of the duty of looking and listening for approaching trains as he approached and went over the crossing; and if the jury shall believe from the evidence that, if the

Northern Cent. Ry. Co. v. State

deceased had so looked and listened, he would have seen or heard defendant's engines in time, by the exercise of ordinary care, to avoid the injury, the plaintiff is not entitled to recover, and the verdict must be for the defendant, even though the jury shall find that the gates were open, and the watchman made some motion which deceased may have interpreted as an invitation to continue across." The defendant thus had the benefit of an instruction to the jury that the presence of the gates and watchman did not relieve the deceased of the duty of using his own senses to discover the presence of danger as he approached and crossed the tracks.

The court further, by granting the defendant's sixth, seventh, and eighth prayers, instructed the jury to find a verdict in its favor if they found from the evidence either that the deceased, by his own want of ordinary care, contributed in any degree to the happening of his injury; or if, while he was in a place of safety, the gateman warned him by voice or gesture not to attempt to cross, and that he, in disregard of such warning, kept on across the track, and was injured in doing so; or that he stopped his horse and cart on the tracks for the purpose of mending or rearranging the harness, and that he could have done this in a place of safety by driving or leading his horse forward off the tracks or backing him off of them, and that he failed to escape injury because, of his so stopping on the track to care for the harness.

The court also, by granting the defendant's ninth prayer, after having modified it, instructed the jury that the testimony of witnesses that they did not hear the bell of the engine ring as it approached the crossing is not entitled to be regarded by the jury as of as great probative value as is the positive affirmative evidence that it was so rung. The defendant had asked the court, by its rejected ninth prayer, to charge the jury that testimony of witnesses that they did not hear the bell was not evidence that it was not rung and must be entirely disregarded by them, and in their brief and argument the defendant's counsel relied upon the *Baltimore & Potomac R. R. v. Roming*, 96 Md. 67, 53 Atl. 672, as authority for their contention in that respect. That is pushing the doctrine of *Roming's Case* further than it was intended by us to go. In that case the only evidence of any negligence on the part of the defendant was the testimony of two persons, who resided a short distance away from the station, that they heard at their residence no whistle or bell from the engine prior to the danger signal, which came almost at the same time with the crash of the collision, as over against the distinct and circumstantial evidence of the engineer and fireman and the operator in the block signal tower at the station that the customary signals of the approach of the train were exchanged between the engine by whistling and the tower by moving the block signal, and that the bell was rung from the engine as usual. Under all of the circumstances of that case we did not think that the failure of the two

Wickenburg v. Minneapolis, etc., Ry. Co

persons, who were not immediately at the station where the accident occurred, to hear the signals, was sufficient of itself to send the case to the jury. We do not regard the present case as a parallel one to Roming's Case.

The defendant's first prayer asked the court to take the case from the jury for want of legally sufficient evidence of any negligence of the defendant or its agents which caused the injury complained of. Its second, third, and fourth prayers assert the proposition that by the uncontradicted evidence the deceased was guilty of contributory negligence, and therefore the verdict must be for the defendant. We do not deem it necessary, after what we have already said in reference to the evidence appearing in the record, to discuss these four rejected prayers of the defendant at length. In view of the character of the evidence, we do not think the court would have been justified in withholding the case from the jury. The prayers which were granted in sending it to them correctly presented the law of the case. The court committed no error in rejecting the prayers which it refused to grant, or in modifying as did the defendant's fifth and ninth prayers before granting them. The judgment appealed from must be affirmed.

Judgment affirmed, with costs.

WICKENBURG *v.* MINNEAPOLIS, ST. P. & S. S. M. Ry. Co.

(Supreme Court of Minnesota, Feb. 24, 1905.)

[102 N. W. Rep. 713.]

Personal Injuries—Right of Action.—To entitle one to maintain an action for injuries to his person by reason of the negligence of another, it must appear that some obligation or duty existed on the part of the person causing the injury toward the person injured, and that the same was left undischarged or unfulfilled.

Accident at Crossing—Collision with Another Train—Violation of Statute—Injury to Boy Trespassing on Train—Liability.*—The tracks of defendant and the Chicago, St. Paul, Minneapolis & Omaha Railway Company intersect at Turtle Lake, in the state of Wisconsin. The statutes of that state expressly require all trains operated on railroads therein, before passing over another railroad track at a point of intersection, to come to a stop at a distance of 400 feet therefrom. Defendant, in violation of the statute, failed to stop one of its trains on the occasion complained of in this action, and negligently collided at the crossing with a train on the Omaha Road, seriously injuring plaintiff. Plaintiff is a boy about 12 years of age, and got upon the Omaha train when it stopped before passing the crossing for the purpose of riding from there to the station. He was riding upon or clinging to the steps of one of the cars of that train, in violation of a statute of the state of Wisconsin. He was not a passenger, nor did he intend to become such, and his presence on the train was unknown to the Omaha Company or any of its employees. It is held that the

*See foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397.

Wickenburg v. Minneapolis, etc., Ry. Co

obligation of defendant to exercise reasonable care to avoid a collision with the Omaha train, or to injure persons lawfully thereon, did not extend to plaintiff, and he cannot recover.

(Syllabus by the Court.)

Appeal from District Court, Washington County; W. C. Williston, Judge.

Action by Edward Wickenburg, by Frank Wickenburg, his guardian ad litem, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for plaintiff. From an order denying a motion for judgment notwithstanding the verdict, or for a new trial, defendant appeals. Reversed.

Alfred H. Bright (*Manwaring & Sullivan*, of counsel), for appellant.

Thomas Canty and Bond & Armstrong, for respondent.

BROWN, J. Action to recover for personal injuries growing out of a collision at Turtle Lake, Wis., between a passenger train on the Chicago, St. Paul, Minneapolis & Omaha Railroad and defendant at a crossing of the two roads. Plaintiff had a verdict in the court below, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

The facts are as follows: The tracks of the two railroads intersect at Turtle Lake, in Wisconsin. On both of the roads, 400 feet from the point of intersection, each company placed what is termed in the record a "stop board," at which, by the statutes of the state of Wisconsin, all trains are required to come to a stop before passing over the crossing. On the occasion in question the Omaha train complied with the law—at least, the evidence is sufficient to justify the jury in so finding—but the train operated by defendant, according to the evidence, neglected to do so, in consequence of which its train ran into the Omaha train at the crossing, seriously injuring plaintiff. Plaintiff is a boy between 12 and 13 years of age, and on the day of the collision got upon the Omaha train when it stopped at the "stop board" for the purpose of riding from there to the station, which was some distance beyond the crossing. He was upon the forward steps of a combination car attached to the Omaha train, between that and the mail car. He was not a passenger, nor did he intend to become such, nor an employee of the Omaha Company, and, so far as the record discloses, had no right upon the train, and his presence was unknown to the employees operating the same. In addition to the fact that he was not upon the train as a passenger, or with the consent or knowledge of the Omaha Company, he was there in violation of section 4397b of the Revised Statutes of the state of Wisconsin. That statute prohibits any person under the age of 17 years from getting upon, or attempting to get upon, or clinging to, jumping or stepping from, any railroad car or train while the same is in motion. Plaintiff, being upon the steps of the car, with his hands holding onto the hand rails, was, within

Wickenburg v. Minneapolis, etc., Ry. Co

the meaning of the statute, clinging to the car while the same was in motion. At the time of the collision he was either thrown from the car, or, in an attempt to save himself from injury, jumped therefrom, and received the injuries complained of. The facts are undisputed, and substantially as stated. The case presents the bare question whether defendant is liable to him for the injuries thus sustained.

It is elementary that, in order to maintain an action for an injury to the person by reason of the alleged negligence of another, it must appear that some obligation or duty existed on the part of the person causing the injury toward the person injured, and that the same was left undischarged or unfulfilled. The question in the case at bar is, what duty did the defendant owe plaintiff on the occasion in question? We have repeatedly held, in harmony with the authorities generally, that a railway company owes no duty to a trespasser upon its trains until it discovers him in a position of peril, and is not liable to him for injuries sustained through its failure to exercise reasonable and ordinary care; that liability exists, as to such persons, only for a willful and wanton injury, and that rule applies to the case at bar. It was the duty of defendant, in respect to operating its trains over the crossing of the Omaha Road, to comply with the statutes of Wisconsin, and bring its train to a stop before passing the crossing; and the failure to do so would constitute actionable negligence as to all persons to whom it owed the duty to so act. And, too, the elementary rule of law that one should so use his own as not unnecessarily to injure another would require the exercise of the same degree of care that is imposed by the statute. The rights, duties, and obligations respecting the operation of trains at the crossing, and liability for negligent acts of commission or omission, as between the two companies, are reciprocal, and extend by relation to all persons lawfully upon the trains of each. The care required by the statute and the rule just stated was not exercised by defendant on the occasion in question, and the important question for consideration is whether a person occupying the position plaintiff did—a trespasser upon the train with which defendant negligently came into collision—may complain of the failure to do so. Plaintiff was not only a trespasser upon the Omaha train, but was clinging to one of the cars attached thereto while the same was in motion, in violation of express law. He was a wrongdoer, and, if his injuries had been caused by the negligence of that company, instead of the negligence of defendant, he would unquestionably have had no redress. It seems to us that it would be doubtful logic that would grant him relief against defendant. While he was not a trespasser as to defendant when he got upon the Omaha train, he was such at the point of intersection of the two roads, for the rights of defendant at the crossing were equal to those of the Omaha Company. The rules applicable and which controls the decision in this case is correctly stated in *Akers v. Ry. Co.*, 58 Minn. 540,

Wickenburg v. Minneapolis, etc., Ry. Co

60 N. W. 669. It was there said: "Actionable negligence is the failure to discharge a legal duty to the person injured. If there be no duty, there is no negligence. Even if defendant owed a duty to some one else, but did not owe it to the person injured, no action will lie." Defendant was charged in that case with failing and neglecting to block a frog in one of the yard tracks over which plaintiff, a trespasser, was walking, in consequence of which failure his foot was caught in the frog, and he was injured. The court held that although defendant was under obligations to block the frog, as to its employees and others rightfully upon its premises, it did not owe that duty to plaintiff. Unless we are prepared to ingraft an exception upon the general rule that a trespasser is not entitled to recover for injuries, resulting from the failure to exercise ordinary care on the part of the person inflicting the injury, plaintiff cannot recover. This we are not prepared to do. The fact that the accident complained of was caused by the failure of defendant to observe a statutory requirement—to stop its train before passing the crossing—is of no special significance. The mere fact that defendant violated the statute does not enlarge the rule of responsibility, and render it liable to one to whom it would not be liable if the statute did not exist. *Ill. Central Ry. Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098.

The main contention of plaintiff's counsel is that defendant is in no position to be heard to say that plaintiff was a trespasser upon the Omaha train; that liability for its negligence extends to him, as well as to all other persons upon the train at that time. This contention goes to the substance of the question, and cannot be sustained without denying to defendant the right to be heard in its defense, and to show that it was under no obligation to plaintiff; and this in the face of the fact that plaintiff's right of recovery is exclusively predicated upon defendant's failure to perform and fulfill an alleged duty it owed him. If a recovery may be had by a person occupying the position plaintiff did—riding upon the steps of the Omaha train without the knowledge or consent of the company—then the individual known to the world as the "tramp," riding upon the brake beams under the car, would be equally entitled to recover; and the courts would hesitate long, in an extreme case of that kind, to declare that he was entitled to recognition.

We need not indulge in a discussion of the question whether persons upon a train with which another negligently collides, who are there with the knowledge and consent of the company, riding without payment of fare with the consent of the employees or upon forged passes, or other unlawful or fraudulent means, would be entitled to recover. There is a marked distinction between persons riding on a train with the knowledge and consent of its employees, and persons situated as plaintiff was—upon the steps of one of the cars attached to the train, without right, in violation of express law, and without the knowledge or consent of the company.

Johnson v. Detroit & M. Ry. Co

In view of the elementary principles of law with which we are confronted, we are constrained to hold that plaintiff is not entitled to recover. He was a trespasser upon the Omaha train—there without the knowledge or consent of the Omaha Company—and defendant owed him no duty and was under no obligation to exercise reasonable and ordinary care for his protection. While the rule extends to all persons lawfully upon the train with which defendant's train collided, it did not extend to plaintiff.

The facts in the case are not in dispute. There is no probability that a better case can be made on a second trial, and the order appealed from will therefore be reversed, and the cause remanded, with directions to the court below to enter judgment for defendant.

JOHNSON v. DETROIT & M. RY. CO.

(Supreme Court of Michigan, March 7, 1905.)

[102 N. W. Rep. 744.]

Railroads—Cattle Guard—Sufficiency.*—A railroad company has not complied with the statute where there is an unguarded space between a cattle guard and a "glance fence," through which cattle may pass, though the guard is of the standard width, approved by the railroad commissioner, and though placing the fence nearer the guard would not permit the passage of trains.

Error to Circuit Court, Iosco County; Main J. Connine, Judge.

Action by Nelson Johnson against the Detroit & Mackinac Railway Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Argued before CARPENTER, BLAIR, MONTGOMERY, HOOKER, and OSTRANDER, JJ.

Jahraus & Rawden, for plaintiff in error.

Charles R. Henry, for defendant in error.

HOOKER, J. A former opinion in this cause has disposed of many questions that might otherwise require consideration upon this record. It will be found in 97 N. W. 760. As will be seen from that case, the plaintiff had recovered a verdict and judgment against the defendant railroad company for the loss of stock killed by defendant's train. According to the brief of the defendant, the negligence relied on was (1) That the cattle guard was allowed to remain dented and flattened so that cattle could cross it; (2) that the "glance fence" did not extend up to the cattle guard, but left a strip of ground shown to be nine inches wide, thus affording opportunity for the cattle to pass. The glance fence was a fence built parallel with the railroad. Theoret-

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to cattle guards, see foot-note appended to *Campbell v. Iowa Cent. Ry. Co.* (Iowa), 12 R. R. R. 601, 35 Am. & Eng. R. Cas., N. S., 601.

Merachel v. Louisville & N. R. Co

ically, it should be built close to the cattle guard; and in this case it was inclined so as to accommodate the wider portions of the cars, above the running gear. In this case the inclination from the track was about 45 degrees. The defendants urged that the glance fence was set as close to the cattle guard as the passage of the trains would permit, and that was all that the law required, that this pattern of guard was made of a certain standard width, and that the approval of such pattern by the railroad commissioner precluded the claim that it should have been wider, so that it could extend far enough to make it practicable to build the glance fence up close to it. It would be unreasonable to suppose that the installation of a cattle guard, with nothing to prevent cattle passing by the side of it, would be a compliance with the statute. It was the manifest intention that the gap should be closed, except a sufficient space for the passage of trains, and that the portion thus left open should be protected by a cattle guard of approved pattern. If there was a strip broad enough for cattle to walk upon, the law was not complied with. There was no error in submitting to the jury the question whether this glance fence and cattle guard were negligently constructed.

Counsel complain that the court instructed the jury that it was defendant's duty to put in such a cattle guard as would prevent cattle from passing, which made defendant an insurer. An examination of the portions of the charge complained of does not establish this claim.

Error is assigned upon the alleged charge that the opinions of experts in relation to the safe condition of the guard "were not binding upon the jury." This is not a full quotation of the language of the judge. When read with other comments accompanying it, no fault can be found with it. The same language was approved on the former hearing.

There are a few other assignments of error, but our examination convinces us that they are baseless, and that no useful purpose would be subserved by discussing them.

The judgment is affirmed.

MERSCHER v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, March 2, 1905.)

[85 S. W. Rep. 710.]

Torpedoes—Negligent Keeping—Personal Injuries—Petition—Duplication.—Under the Civil Code of Practice, permitting pleading in the alternative, a petition to recover for personal injuries, charging that an agent and servant of the defendant railroad with gross negligence placed a railway torpedo on a sidewalk, where it was found, or with gross negligence placed it on the railroad track so that it could be easily removed or brushed away, and suffered it to be removed to the place where it was found; that one of such statements is true, but that the plaintiff does not know which one is true, etc.—is not bad for duplicity.

Merschel v. Louisville & N. R. Co

Same—Same—Injury to Child—Liability of Railroad.*—Where a railroad company's agent and servant, as the custodian of explosives in use by the company, and charged with their safe-keeping, negligently placed a railroad torpedo on the railroad track or on a public street, whence it was picked up by a child, and through childish curiosity struck and exploded, the railroad company was liable for the injuries to the child caused thereby.

Appeal from Circuit Court, Campbell County.

Action by Robert Henry Merschel, by his next friend, against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Samuel C. Bailey, for appellant.

Benjamin D. Warfield and *Jas. C. Wright*, for appellee.

PAYNTER, J. The court sustained a demurrer to the petition, and, the plaintiff refusing to plead further, the petition was dismissed. From the petition it appears that the appellant is a boy 11 years of age; that he lost an eye by the explosion of a railway torpedo which he had picked up from a public street near the appellee's track in a populous part of the city of Newport, where children were accustomed to play. The boy's childish curiosity to discover the contents of the torpedo lead him to strike it with a hammer, causing it to explode, and thus inflicting the injury of which complaint is made. By the petition as amended it is substantially stated that an agent and servant of the defendant with gross negligence and carelessness placed the torpedo on the sidewalk where it was found, or with gross negligence and carelessness placed it on the railroad track so that it could be easily removed or brushed away, and suffered it to be removed to the place where it was found; that one of these statements is true, but he does not know which one is true; that the agent and servant who placed the torpedo upon the sidewalk had been and then was charged by the defendant with the duty of safely keeping the torpedo; that he knew of its dangerous character; that the agent and servant of the defendant, if he placed the torpedo upon the track, had been and was then duly intrusted with its safe-keeping. The averment that it was negligently placed upon the track and the one that it was placed upon the sidewalk were made in the alternative, which is permitted under the Civil Code of Practice. The plaintiff proceeded upon the idea that, if the agent and servant of the defendant who was intrusted with the care of the torpedo placed it upon the track in such a negligent way as to be easily removed or knocked therefrom to the street, he was entitled to recover the damages sustained. Again, if this was not true, if he, being charged with the safe-keeping of the torpedo, negligently placed it upon the street, and the plaintiff was thereby injured, he was entitled to recover. The defendant being a corporate entity, it could only have the custody and control of the torpedoes through the in-

*See foot-note appended to *Kansas City, etc., R. Co. v. Matson* (Kan.), 12 R. R. R. 675, 35 Am. & Eng. R. Cas., N. S., 675.

Merschel v. Louisville & N. R. Co

strumentality of agents or servants. The demurrer admits that the agent and servant was charged with the safe-keeping of the torpedo and use of it at the time it was placed upon the track or upon the street. Therefore it was the act of the defendant in so placing it. If the master himself has control of forces or explosives calculated to endanger life, the obligation is upon him to control or superintend them. He is under an obligation to use proper care for the protection of life and property therefrom. If he substitutes another to represent him in their care and control, the same obligation remains upon him. The master is responsible for the negligent acts of his servants in the course of their employment. This is true whether the negligent act be authorized or forbidden. In *Sherman & Redfield on Negligence* (5th Ed.) § 146, it is said: "The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized, or even forbidden, by him, and though outside of their 'line of duty,' and without regard to their motives. He cannot limit his responsibility for any servant by employing him only with reference to a single branch of the business." In *Cohen v. D. D. E. B. & B. R. R. Co.*, 69 N. Y. 170, it is said: "The master who puts a servant in a place of trust or responsibility, or commits him to the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, * * * goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." In *Thompson on Negligence*, vol. 1, § 523, it is said: "Every person who employs highly dangerous agencies upon his premises or about his business stands under the obligation of exercising, to the end that third persons shall not be injured through those agencies, a degree of care proportionate to the danger of such injury." This court has recognized the rules announced by the authors quoted as being correct. In *Bransom's Adm'r v. Labrot, etc.*, 81 Ky. 638, 50 Am. Rep. 193, it is said: "It is held that a party is guilty of negligence in leaving anything in a place when he knows it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person. 1 Addison on Torts, 511. And said a learned judge: 'It appears to me that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so because the imprudence and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion.'" In the case of *City of Owensboro v. York's Adm'r*, 77 S. W. 1130, 25 Ky. Law Rep. 1399, it was said: "It is incumbent on those having dangerous instrumentalities not to leave exposed to the reach of children anything which would be tempting to them, and which they, in

Willis v. Maysville & B. S. R. Co

their immature judgment, might naturally suppose they could handle and play with." Our conclusion is that, if the agent and servant of the defendant had the care and custody of the torpedo, and negligently placed it upon the railroad track, or upon the street, under the circumstances stated in the petition, it is liable for the injury inflicted upon the plaintiff.

It is urged that the petition is defective, because there was no averment that the act was within the scope of the agent and servant's employment. It was not necessary to make this averment, because it was averred in the petition that the agent and servant had the care and custody of the torpedo, and so had it at the time when it was so placed upon the track or street. If the master had imposed the duty upon the servant to care for the torpedo, and that duty was resting upon him at the time it was placed upon the track or street, the wrongful act was within the scope of his employment, though a grossly negligent one. The substance of the averment is that the negligent act was committed by the agent within the scope of his authority. The doctrine enunciated in *Sullivan v. Louisville & Nashville R. R. Co.*, 74 S. W. 171, 24 Ky. Law Rep. 2344, does not apply to the facts averred in the petition. In that case the party who caused the injury to be inflicted did not have the care and custody of the torpedo as the agent or servant of the defendant. The act was not done within the scope of the servant's employment. It was an intentional act, apart from the employment; hence a different rule from the one here invoked was adjudged and applied to the facts of that case. Of course, this opinion is predicated upon the facts admitted by the demurrer, and may or may not have any application to the facts which may be developed on the trial of the case.

The judgment is reversed for proceedings consistent with this opinion.

BARKER, J., dissenting.

WILLIS v. MAYSVILLE & B. S. R. Co. et al.

(Court of Appeals of Kentucky, Feb. 28, 1905.)

[85 S. W. Rep. 716.]

Injury to Boy Near Train—Act of Brakeman—Contributory Negligence.—Where a boy, standing in a street, was injured by being struck with a piece of ice kicked by a brakeman from the platform of a passing caboose the boy was not guilty of contributory negligence because of his position near the train.

Same—Same—Knowledge of Master—Scope of Employment.*—Where a boy was injured by being struck with a piece of ice kicked by a brakeman from the platform of a passing caboose, it was not necessary, in an action against the railroad for the injury, to show that the master knew of the placing of the ice on the car, or that it was thrown from the train with his knowledge or by his direction,

*See foot-note appended to *Alabama & V. R. Co. v. Livingston* (Miss.), 13 R. R. R. 464, 36 Am. & Eng. R. Cas., N. S., 464.

Willis v. Maysville & B. S. R. Co

but a reasonable inference that the servant was within the scope of his authority was sufficient.

Same—Same—Scope of Employment.—Where a boy was injured by being struck with a piece of ice kicked by a brakeman from the platform of a passing caboose, held, that the question whether the brakeman was acting within the scope of his authority was for the jury.

Appeal from Circuit Court, Greenup County.

Action by Ottis Willis against the Maysville & Big Sandy Railroad Company and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

A. D. Cole and W. T. Cole, for appellant.

W. H. Wadsworth and Worthington & Cochran, for appellees.

PAYNTER, J. Ottis Willis, a boy 13 years of age, was standing on a street in the town of Greenup, near the track of the appellee where it crosses the street, and while so standing one of appellee's freight trains passed over the track, and as the rear of the caboose reached the point opposite where Willis stood a brakeman on the train kicked a cake of ice weighing about 20 pounds from the platform of the caboose, which struck the boy near the heart, from the effects of which it is claimed he sustained a serious injury and endured much pain. The boy was standing quite near the track at the time the injury was received. The street was used by the public as such streets are usually used in towns of that size. The court gave a peremptory instruction to the jury to find for the appellee.

It is contended that the court properly gave the instruction, because (1) the appellee did not owe appellant any duty at the time and place and under the circumstances of his injury; (2) his contributory negligence was the sole cause of the accident; (3) there was no evidence upon which to base the claim that the brakeman at the time of the injury was acting within the scope of his authority.

The boy, in common with the public, had the right to use the street. Under the law as enunciated by this court, there is a duty imposed upon those operating trains through towns to keep a lookout for persons upon streets, and especially at street crossings. It certainly would be negligence in a railroad company to have its agents and servants throwing substances from trains into the streets as it passes along or across them. If the agents or servants do so by the authority of the master, and an injury is inflicted on persons using the street, it would be actionable wrong. It is the duty of railroad companies to exercise proper care, so as to avoid injuring persons on streets of towns over which they pass. A failure to observe such care is certainly a breach of duty.

It is urged that the boy was guilty of contributory negligence because of his position near the train. We fail to see any negligence in the boy standing in the street at a point where there was no danger of being struck by the train. He was not required to

Willis v. Mayaville & B. S. R. Co

anticipate that persons connected with the train would throw large lumps of ice from it as it passed across the street, so we are unable to see wherein Willis was guilty of any negligence. Had he been close enough to the train to have been struck by the cars as they passed, then it could be urged that he was guilty of negligence, and except for which the accident would not have happened.

The last and most serious question to be considered is, was there evidence from which the court and jury might infer that the act of which complaint is made was done within the scope of the authority of the brakeman? The law is too well settled to require any discussion or citation of authorities that, where a servant assaults one while not in the performance of a duty imposed upon him by his employment, or who inflicts an injury upon another when not acting within the scope of his authority, the master is not responsible. If a conductor or brakeman on a train, while passing over the track, should fire a gun at some one standing upon the street or in a field, and inflicts an injury upon the person, the railroad company could not be held responsible. If he should leave his train, and willfully assault one with a bludgeon, the master could not be held responsible for that act, because he would be acting entirely without the scope of his employment. If a servant on a train, acting within the scope of his authority, rightfully attempts to eject a person from it, the master is liable if any injury is inflicted upon such one, if it is done by the use of excessive force, or under circumstances as to time and place which render the act wrongful. Whilst the master has only authorized the use of proper force to make the ejection, at a proper time and place, still the master is responsible if an injury is inflicted by the use of excessive force, or at an improper time or place, because the servant was acting within the scope of his authority. The question recurs as to whether the court can infer from the evidence that the servant was acting within the scope of his authority. The brakeman was on a freight train. It is a matter of common knowledge that property is transported on freight trains. The evidence excludes the idea that the brakeman intentionally hurled the cake of ice from the train to injure the boy. It is possible that the ice was being carried for or without compensation, and, as an easy means to discharge it, it was thrown from the train at its destination. It was not essential for the plaintiff to make out his case to prove that the lump of ice was placed on the car with the knowledge of the master, or that it was thrown from the train with his knowledge, or by his direction. The case is sufficiently made out if a reasonable inference might be drawn from the facts that the servant was acting within the scope of his authority. We shall not anticipate the defense or prejudge the question that may hereafter arise, but we are of the opinion that the evidence was sufficient to warrant the submission of the case to the jury.

The judgment is reversed for proceedings consistent with this opinion.

ILLINOIS TERMINAL R. CO. *v.* MITCHELL.

(Supreme Court of Illinois, Feb. 21, 1905.)

[73 N. E. Rep. 449.]

Trespassers—Railroads in Streets—Use of Tracks by Pedestrians.*
—A person walking along railroad tracks maintained in a public street by permission of the city council is not a trespasser, especially where over 100 people have daily used the tracks as a public way for many years.

Railroads in Streets—Use of Tracks by Pedestrians—Speed—Signals—Right to Presume That Ordinance Will Be Obeyed.—A person rightfully using a railroad track as a thoroughfare has a right to presume that trains will approach at a speed permitted by the city ordinance, and that warning will be given by ringing the bell or otherwise.

Same—Absence of Signals—Violation of Ordinance Limiting Speed—Directing Verdict.—In an action against a railroad company for injuries to a pedestrian on the track, it appeared that the tracks were in a public street and were used as a public way. Plaintiff testified that before going on the track he looked for an approaching train; that he could see down the track 1,000 feet, but no train was in sight; that the train which struck him approached without ringing the bell or giving other warning. There was evidence that the train was running at a speed exceeding that limited by the city ordinance. Held, that defendant was not entitled to a peremptory instruction.

Appeal—Review.—Where the error assigned is the refusal of the court to direct a verdict for defendant, it is not the duty of the Supreme Court to weigh the evidence or to determine in whose favor it preponderates.

Appeal from Appellate Court, Fourth District.

Action for personal injuries by Jacob Mitchell against the Illinois Terminal Railroad Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

Henry S. Baker and Travous, Warnock & Burrough, for appellant.

Webb & Webb and Burton & Wheeler, for appellee.

HAND, J. This case is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment of the circuit court of Madison county in favor of appellee for the sum of \$1,329, rendered against appellant for damages alleged to have been received by appellee to his person while walking on the track of appellant laid in a street in the city of Alton. The declaration contains four counts, the first of which charges that by reason of the careless and improper management of the train of appellant it struck and injured appellee while he was walking along Front street, in the city of Alton. The second count sets

*See foot-notes appended to *Wagner v. Chicago & N. W. Ry. Co.* (Iowa), 11 R. R. R. 789, 34 Am. & Eng. R. Cas., N. S., 789; foot-notes appended to *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358; *Chesapeake & O. Ry. Co. v. See's Adm'x* (Ky.), 11 R. R. R. 342, 34 Am. & Eng. R. Cas., N. S., 342.

Illinois Terminal R. Co. v. Mitchell

out the speed ordinance of the city of Alton and charges a violation thereof. The third count charges a failure to comply with the duty to ring a bell continuously while within the city limits, as required by ordinance; and the fourth sets out the speed ordinance, and charges that appellant wilfully and wantonly ran its train at a prohibited rate of speed. All of the counts except the fourth aver that the injury was received while appellee was upon a public highway.

The only error assigned or argued by appellant is the refusal of the trial court to give a peremptory instruction at the close of the plaintiff's evidence and at the close of all the evidence; said instruction having been offered by it on each occasion. This requires an examination of the testimony for the purpose of determining whether there is evidence in this record tending to prove the cause of action alleged in the declaration. The evidence tends to show that appellee, at the time of the accident, was nearly 61 years of age, a common laborer, and that on the morning of the accident he passed down Oak street, in the city of Alton, until he reached Front street; that he then crossed three railway tracks situated upon Front street to the track of the "Bluff Line," so called in the evidence, and started east on this track; that shortly thereafter he saw a train approaching on this track, and he crossed over to the track of appellant; that before going on its track he looked west to the curve, about 1,000 feet, and saw no train approaching; that after he had walked about 150 feet east on the track of appellant he heard the whistle of a train behind him, turned to see what it was, and knew no more until he regained consciousness in the hospital, 10 days later; that both legs were broken in several places, three ribs were fractured, and one of his arms was broken, besides many bruises and concussions. There is a sharp conflict in the evidence as to whether a bell was rung and at what speed the train was moving at the time of the accident, and the jury might well have taken either view in passing upon those questions.

It is urged by appellant that appellee was a trespasser, and had no right upon its tracks at the time of the accident; but we believe this position is untenable. Two plats were introduced in evidence, one purporting to be of Charles W. Hunter's addition to Lower Alton and North Liberty, made October 25, 1836, acknowledged by Hunter on February 15, 1837, and on that day recorded, showing Front street extending east of the place of the accident some seven blocks, and the other purporting to be of William Russell's addition to Alton, made August 11, 1837, covering a portion of the same territory, authenticated by Russell January 21, 1850, and approved and adopted by Charles W. Hunter February 21, 1850, designating the portion of Front street between Oak street and the street four blocks east thereof, called Apple street, "Public City Commons." On the 9th day of July, 1895, the city council of Alton passed an ordinance authorizing appellant to construct and maintain a railroad track over, along,

Illinois Terminal R. Co. v. Mitchell

and upon Front street from Henry street, which is several blocks west of the place of the accident, to the city limits, which was east of the place of the accident, which ordinance was accepted in all its terms by appellant. In addition to this fact the evidence shows that from 100 to 150 persons daily traveled over said tracks longitudinally, and that the same has been used by the public as a way for years. We are of the opinion that appellee cannot, under these circumstances, be heard to say that appellee was a trespasser at the time of the accident, as the evidence tended to sustain the contention of appellee that he was upon Front street at the time of being injured. A traveler has the same rights upon a street upon which a railroad company has been authorized to construct its tracks as the railroad company, but convenience requires that the traveler give way to the trains of the railroad company.

Appellee being rightfully upon Front street at the time of the accident, and there being evidence tending to prove a violation of the speed ordinance and a failure to ring a bell or give other warning of the approach of the train, but one question remains for consideration, viz., whether appellee was guilty of contributory negligence. Appellee swore that before he went upon the track of appellant he looked down its track for 1,000 feet to the west, and that no train was in sight, and that timely notice was not given of the approach of the train. Appellee had a right to rely upon the trains of appellant approaching at the rate of speed permitted by the ordinance of the city of Alton, and that its trains would give the warning of their approach required to be given by law. Appellee had a right to be upon Front street, and appellant was bound to take notice of the fact that the public was passing over Front street longitudinally, along its track, and that a violation of the law as to speed and signals would place travelers upon said street in great danger. It is true that railroad tracks are of themselves notice of danger; but we think it was a question for the jury to say whether, in view of all the surrounding circumstances, the appellee was guilty of contributory negligence. It is not the duty of this court, upon the error assigned in this case, to weigh the evidence, or to pass upon the question of in whose favor it preponderates. *Chicago & Eastern Illinois Railroad Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050. If there is evidence in the record fairly tending to support the plaintiff's cause of action, it is proper that the jury pass upon the facts.

From a careful examination of the evidence in this case we are of the opinion that the trial court did not err in refusing to give the peremptory instruction for appellant, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

MARKOWITZ *v.* METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1904.)

[85 S. W. Rep. 351.]

Collision between Street Car and Another Vehicle—Imputable Negligence of Servant.*—The negligence of a servant driving his master's wagon is chargeable to the master, who is riding therein, and who is injured by such negligence.

Same—Contributory Negligence.†—A driver of a wagon, who, on emerging from an alley on a clear day, with nothing to obstruct his view for a block, drove immediately in front of, and came into collision with, an approaching street car, which he either saw, or blindly failed to see, was guilty of contributory negligence.

Same—Right of Motorman to Presume That Driver Will Use His Senses.‡—A motorman who sees a wagon approaching the track in front of his car has the right to presume that the driver will use his senses in looking for cars.

Same—Contributory Negligence and Gross Negligence.—Conceding that the conduct of a motorman in failing to stop his car on seeing a wagon approaching the track in such manner that the driver could see the car raises a question for the jury on the issue of negligence, yet it does not raise the question of such gross negligence or reckless or wanton conduct as to justify the court in submitting the question whether there should be a recovery for injuries to a person on the wagon, resulting from a collision between the car and the wagon, in spite of the driver's own negligence.

Instructions.—Where there can be no recovery, even under plaintiff's own evidence, error in instructions is no ground for new trial after verdict for defendant.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Fannie R. Markowitz against the Metropolitan Street Railway Company. From an order granting a new trial, defendant appeals. Reversed.

John H. Lucas, for appellant.

Leon Block and Wm. C. Hock, for respondent.

VALLIANT, J. Plaintiff alleges that she suffered a personal injury in consequence of a collision between a wagon in which she was riding and a street car of defendant. She sues for \$5,000 damages, alleging that the collision was the result of defendant's negligence.

The scene of the accident was in Fifth street, between Walnut and Main, in Kansas City. Fifth street runs east and west; Walnut and Main cross it at right angles, running north and south; Walnut is east of Main. Between Walnut and Main streets, and

*See foot-note appended to *Duval v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas., N. S., 235.

†See foot-notes appended to *Portsmouth St. R. Co. v. Peed's Adm'r* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65; foot-note appended to *Itzkowitz v. Boston Elev. Ry. Co.* (Mass.), 12 R. R. R. 583, 35 Am. & Eng. R. Cas., N. S., 583.

‡See foot-note appended to *Simpson v. Rhode Island Co.* (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

Markowitz v. Metropolitan St. Ry. Co

parallel to them, is an alley which also crosses Fifth street at right angles. Defendant operates a double track street railroad along Fifth street; a car going west runs on the north track, crossing Walnut, the alley, and Main street. Just west of the alley on the north side of Fifth street is the city market.

On December 24, 1901, the plaintiff was seated beside the driver, a colored man, on the driver's seat, on an open one-horse spring wagon, driving through the alley northward, aiming for the market house. They emerged from the alley on the south side of Fifth street, drove across the south track, and, just as the front wheel of the wagon got on or sufficiently near the south rail of the north track, a car of defendant going west struck the wagon with a blow sufficient to break the shaft from the axle on that side, and the jar caused the plaintiff's injury. She testified that the car struck the wagon, "and it jolted very hard, and I went on the end of the seat, and that gave me an awful pain in the back, and I felt kind of funny in my whole body. Otherwise I would have went over on the left side on the street, but the colored boy held me back. And he helped me down from the wagon; I couldn't sit there."

The petition alleges negligence in four specifications: "First, the motorman of said defendant in charge of said car negligently failed to stop the same in time to avoid said collision, which by the exercise of ordinary care he might have done. Second, the servants of said defendant in charge of said car negligently failed to ring any bells or to give other warning of the approach of said car. Third, the motorman of said defendant in charge of said car negligently failed to keep a vigilant watch ahead, and negligently failed to observe said wagon on or approaching said north track in a position of danger in time to have stopped said car and thereby avoid said collision, which said motorman might have done had he been exercising ordinary care. Fourth, the motorman of said defendant in charge of said car negligently failed to stop the same within a reasonable time after he saw, or by exercising ordinary care might have seen, the dangerous situation of this plaintiff."

The testimony on the part of the plaintiff tended to prove as follows: It was a clear winter day. The car going west stopped at Walnut street to take on some passengers, and then moved on its course. It was going slowly, not to exceed four miles an hour. The street was crowded with vehicles and people. The wagon on which the plaintiff was riding came out of the alley into Fifth street, aiming northward across the tracks. The driver testified: "When we was coming out through the alley between Walnut and Main we didn't see any car at all; but when we got on the second track we seen the car about as far as from here over there. * * * I couldn't tell exactly how far; but, anyhow, we were beckoning him to stop, * * * for him to hold up, because I couldn't go either forward or back; the people was ahead of me in the crowd, and wagons behind me. * * * He just came

Markowitz v. Metropolitan St. Ry. Co

right on up and hit the wagon, and broke the shaft loose and jostled us both up." Witness said he did not stop or check up at all when he came into the street from the alley, and was going tolerably fast when he got on the north track; he was aiming to get out of the crowd. The car stopped in almost the same instant that it struck the wagon. It shoved the wagon about two feet. The plaintiff herself testified that they saw no car until they were on the second track—the north track. She said: "It was awfully crowded with people, and we looked, and, of course, I did not see any car at all. Of course, there was so many people in front of us, and we drove right in; and when we got to the second track I saw the car, and hallooed and screamed as much as possible, and it looks to me like there was a car that struck the wagon, and it jolted very hard." She was asked how far the car was from her when she hallooed to the motorman. She said: "About as far as from here to that wall; about twenty-five feet; I couldn't tell you exactly. I began to make motions and to halloo and scream, and the rest of the people right in front of our wagon they began to make motions to the motorman, and he was keeping on going slowly." She said that when they came out of the alley they saw no car; that they could not see either east or west more than twenty-five feet; and when asked to explain why she could not see farther, seated as she was above the heads of the people on the driver's seat in the wagon, she said she could not explain it, but that twenty-five feet east or west was as far as she could see. Her attention was called to her statements on a former examination in which she was asked if she could not see for the distance of a half a block, her answer being, "I suppose so; I couldn't tell exactly; I saw quite a distance;" to which she replied, "Well, that is twenty-five feet." She testified that her eyesight was good. She and the negro driver of her wagon testified that they did not hear any bell or gong. There was testimony tending to show that the jar of the collision caused serious injury to the plaintiff. At the close of the plaintiff's evidence the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and exception was taken.

On the part of defendant the testimony tended to prove as follows: The car stopped at Walnut, and then moved on westward, going slowly. It was a fine clear day, and there was nothing to prevent one seeing the car coming distant a block away. The track was slippery at that point; it was downgrade, and the motorman was moving cautiously. The wagon came out of the alley, the horse going at a trot, aiming straight across the tracks, the driver and the plaintiff looking to the west. The motorman saw the wagon coming, and at once began ringing his gong, and, when it seemed as if the driver intended to cross the north track in front of the car, the motorman continued sounding the gong, hallooed at the driver, applied his brakes, reversed the power, turned on the sand, and used all the means at hand to stop the

Markowitz v. Metropolitan St. Ry. Co

car, and had brought it almost to a stop when the collision occurred.

The case was submitted to the jury. The verdict was for the defendant. The court sustained the plaintiff's motion for a new trial on the ground that it had erred in giving certain instructions for defendant. Defendant appeals.

If it should be conceded that the defendant was guilty of negligence in either of the three particulars first specified in the petition, still the plaintiff would not be entitled to recover in consequence thereof, because her own negligence contributed to produce the result. It was her wagon, the driver was her servant, and his negligence is chargeable to her. The plaintiff and her driver both testified that they did not see the car that struck them until they were on the north track. The car was there in plain view to be seen by any one who would look, and, if they did not see it, it was because they did not use their eyes. There is no suggestion of an excuse in the record for their failure to see the car. The motorman saw the wagon as soon as it came out of the alley, and he was in no better position to see the wagon than were the plaintiff and her driver to see the car. If the driver saw the car coming (and, even in the face of his assertion to the contrary, it is as probable under the circumstances that he did as that he did not), yet ventured to cross in such dangerous proximity to the car, it was failure to observe that degree of care that an ordinarily prudent person in his situation would have observed. If he did not see it, it was because he did not look, and the act of not seeing, for that reason, was as negligent as an act of seeing and not heeding. It is unnecessary to decide, under the circumstances of this case, whether the car or the wagon had the right of way, because, if it should be conceded that the wagon had the right of way (which is not even contended), and that, as soon as the motorman saw the wagon emerge from the alley and attempt to cross the street, he ought to have stopped his car, yet kept on in his course, still the driver of the wagon, seeing the car coming (or shutting his eyes so he could not see), and knowing that it could not stop as quickly as the horse could, was guilty of negligence in driving immediately in front of it, or so close to it as to render a collision inevitable, or, if not inevitable, at least not improbable.

Counsel for respondent in their brief seem to rely more on the fourth specification of negligence in the petition than in three preceding; that is, that the motorman failed to stop the car "within a reasonable time after he saw, or by the exercise of reasonable care might have seen, the dangerous situation of the plaintiff." The motorman saw the wagon when it first came out of the alley, and saw the course the driver was aiming to take. He saw that the driver and the plaintiff had their faces turned to the west as they crossed the south track, and, if the motorman drew any inference from that fact, the natural inference was that they were taking proper care, because the danger they were in

Markowitz v. Metropolitan St. Ry. Co

while crossing the south track was from a car coming from the west, and the motorman had a right to infer that when they had passed over the south track, and were approaching and about to enter upon the north track, they would, for the same reason, turn their faces to the east. Turning from the west to the east was but the occupation of a moment, a space of time too short to be measured. But whether he noticed how their faces were in fact turned, and drew inferences therefrom or not, he saw the wagon and the driver, and the course they were taking, and he had the right to presume that the driver would use his senses. Even though he saw the horse approach close to the north track, yet if he still presumed that the driver would exercise the care that a man of ordinary prudence and common sense in his situation would exercise, and stop until the car would pass, we cannot say with certainty that he was guilty of negligence in acting on that presumption. And even if it could be said that under those circumstances a question at least of negligence arises, which, as a question of fact, ought to be submitted to the jury, still we cannot say that it is a question of such gross negligence or reckless or wanton conduct as justifies the court in submitting to the jury to say whether or not the plaintiff ought to recover in spite of her own negligence. It requires more than the showing of a mere possibility that the accident might have been avoided in order to bring a case within the humanitarian doctrine announced in *Kellny v. Ry.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, *Morgan v. Ry.*, 159 Mo. 262, 60 S. W. 195, and *Klockenbrink v. Ry.*, 172 Mo. 678, 72 S. W. 900. If it be conceded that the plaintiff's evidence tends to show that the defendant was guilty of any negligence at all, it is the utmost that can be claimed for it, while it shows the negligence of her driver very much more conspicuously. Though the street may have been crowded, yet there was nothing to prevent him from stopping until the car could pass. Even the horse showed a more intelligent appreciation of the situation than did the driver, because, when it was attempted to urge him onto the north track in the face of the danger, he shied as far to the west as he could, and thus saved himself from being struck.

An argument is built upon the estimates of witnesses as to the distance the car was from the horse when he got on the north track and the distance in which it was possible to have stopped the car after the motorman saw the horse on that track, and the conclusion is drawn that the car was 20 or 25 feet distant, and could have been stopped in 15 feet. No witness measured any distance, and no one pretended to speak with precision; under the excitement and confusion of the occurrences the so-called estimates were little, if any, better than guesses. So far as the plaintiff's estimate of the distance is concerned, she showed by her answers, when she was asked as to the distance she could see when elevated on the seat of the open wagon, that her faculty in measuring distances by the eye was not great. Counsel for the

St. Louis, etc., Ry. Co. v. Adams

plaintiff place reliance as to this point on the testimony of the motorman as helping out his case. But the motorman spoke with no precision on that subject; said, in fact, he could not do so; but he did speak with precision when he said that the moment he saw that the horse was coming on the north track he reversed the power, applied the brake, turned sand on the track, and stopped the car in the shortest time and space possible.

It is unnecessary to cite authorities to sustain the conclusion that under the plaintiff's own evidence in this case she was not entitled to recover. And since, in no view of the case, could a verdict for the plaintiff be sustained, it is unnecessary to look at the instructions. Whether the instructions were right or wrong, the verdict was for the right party; it was the only verdict that the evidence warranted. The court therefore erred in granting a new trial.

The judgment granting a new trial is reversed, and the cause remanded with directions to the circuit court to overrule the motion for a new trial and enter judgment for the defendant on the verdict. All concur, except ROBINSON, J., absent.

ST. LOUIS, I. M. & S. RY. CO. v. ADAMS.

(Supreme Court of Arkansas, Feb. 25, 1905.)

[85 S. W. Rep. 768.]

Negligence—Damages—Evidence—Aid from Children.*—In an action for personal injuries, permitting plaintiff to testify that he had a family of from 10 to 12 to support, and, in answer as to how much help he had from the children in making crops, that he had not had a great deal "until this year"; that a boy 16 years old "and this boy I have here * * * are all the boys I have big enough"—was reversible error.

*As to the effect, or admissibility of evidence, of the financial circumstances and size of family, etc., in negligence cases, see Indianapolis St. Ry. Co. v. Schmidt (Ind.), 12 R. R. R. 439, 35 Am. & Eng. R. Cas., N. S., 439 (aggravation of injuries from neglect resulting from financial condition, instruction stating effect of, improper); Illinois Cent. R. Co. v. Atwell (Ill.), 6 R. R. R. 317, 29 Am. & Eng. R. Cas., N. S., 317; foot-note appended to Louisville & N. R. Co. v. Collinsworth (Fla.), 8 R. R. R. 16, 31 Am. & Eng. R. Cas., N. S., 16 (size of family); foot-notes appended to Chicago & E. I. R. Co. v. Driscoll (Ill.), 10 R. R. R. 413, 33 Am. & Eng. R. Cas., N. S., 413 (remarriage of plaintiff, action for death by wrongful act); Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.), 3 R. R. R. 317, 26 Am. & Eng. R. Cas., N. S., 317 (in an action against a railroad, it is not a charge on the facts to say: "I feel confident that you will not be influenced by the fact that the railroad is a rich corporation"); foot-notes appended to Southern Ry. Co. v. McLellan (Miss.), 5 R. R. R. 559, 28 Am. & Eng. R. Cas., N. S., 559 (admissibility of evidence of plaintiff's pecuniary condition); foot-note appended to Louisville & N. R. Co. v. Banks (Ala.), 2 R. R. R. 359, 25 Am. & Eng. R. Cas., N. S., 359; Chicago, R. I. & P. R. Co. v. Hambel (Neb.), 2 R. R. R. 167, 25 Am. & Eng. R. Cas., N. S., 167 (evidence as to value of estate of deceased); Louisville & N. R. Co. v. Carothers (Ky.), 2 R. R. R. 230, 25 Am. &

St. Louis, etc., Ry. Co. v. Adams

Appeal from Circuit Court, Lonoke County; Geo. M. Chapline, Judge.

Action by T. C. Adams against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dodge & Johnson, for appellant.

T. J. Oliphint, for appellee.

BATTLE, J. T. C. Adams brought this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages caused by the negligence of the defendant. He alleged in his complaint that on the 7th day of March, 1900, he was

Eng. R. Cas., N. S., 230 (evidence of plaintiff's accident policies, and that he continued to draw his salary); *Barker v. Ohio River R. Co.* (W. Va.), 4 R. R. R. 132, 27 Am. & Eng. R. Cas., N. S., 132 (it was not reversible error to admit in evidence the fact that the plaintiff's two children, who were with her at the time she was injured through the carrier's negligence, were still living); *Missouri, K. & T. Ry. Co. of Texas v. Bailey* (Tex.), 4 R. R. R. 518, 27 Am. & Eng. R. Cas., N. S., 518 (evidence that plaintiff, an employee, was indebted to third party who threatened to report the indebtedness to the company, and of advances made to him by his attorney, was not admissible); note, 10 Am. & Eng. R. Cas., N. S., 866 (evidence as to number of children of deceased); note, 8 Am. & Eng. R. Cas., N. S., 398 (dependency upon deceased); note, 15 Am. & Eng. R. Cas., N. S., 759 (evidence of number and ages of surviving children, in action by wife for death of husband); note, 13 Am. & Eng. R. Cas., N. S., 507 (evidence of pecuniary condition of plaintiff or beneficiary, in action for death); note, 20 Am. & Eng. R. Cas., N. S., 632 (evidence of plaintiff's domestic relations, the number of his children, etc., in action for personal injuries); *Felton v. Spiro* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 865 (number of children of deceased); *Louisville & N. R. Co. v. York* (Ala.), 23 Am. & Eng. R. Cas., N. S., 470 (evidence as to savings of deceased); *Union Pac. Ry. Co. v. Sternberger* (Kan.), 12 Am. & Eng. R. Cas., N. S., 745 (domestic conduct of deceased as evidence of pecuniary injury); *Alabama Mineral R. Co. v. Jones* (Ala.), 8 Am. & Eng. R. Cas., N. S., 383 (evidence as to dependents); *Brunswick & W. R. Co. v. Wiggins* (Ga.), 22 Am. & Eng. R. Cas., N. S., 588 (evidence that deceased left no estate); *Thoresen v. La Crosse City R. Co.* (Wis.), 6 Am. & Eng. R. Cas., N. S., 101 (proof of husband's financial condition, in action for death of wife); *Lipscomb v. Houston, etc., Ry. Co.* (Tex.), 23 Am. & Eng. R. Cas., N. S., 401 (receipt of money on life insurance policies); *Philpott v. Penn. R. Co.* (Pa.), 5 Am. & Eng. R. Cas., N. S., 471 (remarriage of widow); *Louisville & N. R. Co. v. Jones* (Ala.), 23 Am. & Eng. R. Cas., N. S., 224 (evidence of dependency of deceased's mother); *Gulf, C. & S. F. Ry. Co. v. Younger* (Tex.), 8 Am. & Eng. R. Cas., N. S., 84 (husband's marriage); *Illinois C. R. Co. v. Davis* (Tenn.), 18 Am. & Eng. R. Cas., N. S., 708 (number of children of decedent); *English v. Southern Pac. R. Co.* (Utah), 4 Am. & Eng. R. Cas., N. S., 63 (ages of children of deceased); *Gulf, C. & S. F. Ry. Co. v. Younger* (Tex.), 8 Am. & Eng. R. Cas., N. S., 84 (circumstances of surviving parent); *Louisville & N. R. Co. v. Taafe* (Ky.), 15 Am. & Eng. R. Cas., N. S., 693 (evidence as to surviving family); *Pullman Palace Car Co. v. Lawrence* (Miss.), 8 Am. & Eng. R. Cas., N. S., 59; *Nashville St. R. R. v. O'Bryan* (Tenn.), 22 Am. & Eng. R. Cas., N. S., 902 (evidence as to defendant's wealth where punitive damages are claimed); *Alabama G. S. R. Co. v. Carroll* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759 (poverty of plaintiff).

St. Louis, etc., Ry. Co. v. Adams

traveling from his home toward Little Rock in a wagon drawn by two mules, and loaded with country produce; that it was dark about 8 or 9 o'clock, when he approached the crossing of the public road by the defendant's railway; that when near the track he stopped, and looked and listened, and, seeing no approaching train, moved on the crossing, and when his wagon was upon the track a train of the defendant, consisting of an engine and box car—the latter being in front of the engine, with no light or signal on the same—suddenly came upon him and struck his wagon, knocked it off the track, overturned it, and threw him on the ground, bruising and greatly injuring him.

The defendant answered, and denied all the allegations in the complaint, and alleged that plaintiff's injuries were caused by his own contributory negligence.

The plaintiff recovered a judgment for \$2,000, and the defendant appealed.

The evidence adduced at the trial showed that the appellee, traveling in a wagon drawn by mules, in the nighttime, about 8 or 9 o'clock, drove his wagon upon appellant's railway where it crosses the public road upon which he was traveling, and that a train of the appellant, consisting of an engine and three or four box cars—the latter in front of the former, the engine pushing the cars—struck the wagon, overturned it, and injured the appellee. The evidence tended to show that no signals of the approach of the train were given at the time of this collision, and that no lookout for persons or animals in front of the same was kept, and no lights on the foremost car were exhibited, and that the injury received impaired his earning capacity.

In that course of this trial, appellee asked this question: "How much family have you had to support?" To which appellant objected. Its objection was overruled, and it excepted. He (appellee), being the witness, answered: "From 10 to 12. I have had 12 children." He was further asked: "How much help did you have from those children in making crops?" He answered, "I haven't had a great deal until this year. I have a boy 16 years old, and this boy I have here—they are all the boys I have big enough."

The question and answer as to size of his family and the number of his children were inadmissible and prejudicial. This evidence did not tend to show an increase of his earning capacity, but of his expenses. As to this evidence we say, as the court said of similar evidence in *Pennsylvania Company v. Roy*, 102 U. S. 451, 460, 26 L. Ed. 141: "The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and consequently that his injuries involved the comfort of his family. This proof in connection with the impairment of his ability to earn money was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just

Woolf v. Washington Ry. & Nav. Co

compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict." And we add, whatever may have been the object of its introduction, the effect was the same, and prejudicial. See, also, *Kreuziger v. Chicago & N. W. Ry. Co.* (Wis.) 40 N. W. 657, 659, and cases cited.

As the judgment will be reversed, we make no comment upon the sufficiency of the evidence. The opinion heretofore delivered in this case is hereby withdrawn.

Reversed and remanded for a new trial.

WOOLF v. WASHINGTON RY. & NAV. CO.

(Supreme Court of Washington, March 15, 1905.)

[79 Pac. Rep. 997.]

Accident at Crossing—Contributory Negligence.—One driving towards a railroad crossing, who could at any point, for a considerable distance before reaching the same, have seen the approach of a locomotive, had he looked, and either did not look, or else did look, and saw the locomotive, and nevertheless attempted to cross ahead of the same, was in either event guilty of contributory negligence, in law.

Same—Presumption of Due Care on Part of Deceased.*—It cannot be presumed that one killed at a railway crossing was in the exercise of due care, where the attendant facts, explained by any hypothesis that they will admit of, show that such was not the case.

Same—Right to Assume That Traveler Will Avoid Danger.†—Operatives of a locomotive, seeing a driver approaching a crossing at a distance of more than 50 feet, are justified in believing that he will not attempt to cross the track so as to threaten a collision.

Same—Negligence and Contributory Negligence.‡—Negligence in the operatives of an engine in not seeing one approaching a crossing is not ground for a recovery against the railroad for injury to such one, where he was also negligent in not seeing the engine, and, because of such negligence, put himself in the way of a collision.

Comparative Negligence.§—The doctrine of comparative negligence does not obtain in Washington.

*As to the presumption of due care on the part of a person killed by a train, see foot-notes appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31; *Kansas City-Leavenworth R. Co. v. Gallagher* (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750; *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294.

†See foot-note appended to *Simpson v. Rhode Island Co.* (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

‡See foot-note appended to *French v. Grand Trunk Ry. Co.* (Vt.), 13 R. R. R. 426, 36 Am. & Eng. R. Cas., N. S., 426; foot-note appended to *Memphis St. Ry. Co. v. Haynes* (Tenn.), 13 R. R. R. 384, 36 Am. & Eng. R. Cas., N. S., 384.

§For the authorities in this series on the subject of comparative negligence, see *Riley v. Missouri Pac. Ry. Co.* (Neb.), 7 R. R. R.

Woolf v. Washington Ry. & Nav. Co

Appeal—Review.—Where the jury has disregarded both the evidence and instructions on an issue of contributory negligence, its verdict is not conclusive upon the Supreme Court, but may be set aside by it.

Appeal from Superior Court, Clarke County; A. L. Miller, Judge.

Action by Alice O. Woolf against the Washington Railway & Navigation Company. From a judgment for plaintiff, defendant appeals. Reversed.

B. S. Grosscup, Jas. F. McElroy, and A. G. Avery, for appellant.

Rands & Hopkins and Bennett & Sinnott, for respondent.

Roor, J. Respondent's husband, while crossing appellant's railway track upon a public highway near Vancouver, Wash., was struck by a locomotive and killed. This action was brought for damages, and resulted in a verdict and judgment of \$17,500 in favor of respondent. From said judgment, appeal is taken to this court.

The most important errors assigned turn upon the question of the sufficiency of the evidence to sustain the verdict and judgment. The material facts were substantially as follows: Deceased was riding in an ordinary farm wagon, driving a team of horses from Vancouver, along the county road, toward his home. About a quarter of a mile south of where the accident occurred, the county road crosses the railroad and at a point about 200 feet west of the track makes a right angle, and then runs directly north. The railroad track, from the crossing just mentioned, runs in a northerly direction, bearing a little to the west, to a point where it is again crossed by the county road; this crossing being known as "Shaw's Crossing," and the crossing above mentioned being known as "Porter's Crossing." For a considerable distance north of Porter's crossing the public highway and railroad run almost parallel, and about 200 feet apart, but gradually converge, forming an acute angle at Shaw's crossing. For a considerable distance between the two crossings there was an orchard, which partially obstructed the view of the railway track from the county road, but the north end of said orchard was a distance of 475 feet south of Shaw's crossing. In this space there were no trees between the county road and the railway track, although along part of this distance the railway ran through a cut with an embankment between seven and eight feet high, which, however, gradually decreased in the direction of Shaw's crossing, until at the crossing it disappeared entirely.

594, 30 Am. & Eng. R. Cas., N. S., 594 (doctrine not recognized in Missouri); extensive note, 11 Am. & Eng. R. Cas., N. S., 842; *Cicero & Proviso St. R. Co. v. Meixner* (Ill.), 4 Am. & Eng. R. Cas., N. S., 246; *Missouri Pac. Ry. Co. v. Fox* (Neb.), 12 Am. & Eng. R. Cas., N. S., 863; *Macon & I. S. Elec. St. Ry. Co. v. Holmes* (Ga.), 12 Am. & Eng. R. Cas., N. S., 385; *Southern Ry. Co. v. Watson* (Ga.), 11 Am. & Eng. R. Cas., N. S., 839.

Woolf v. Washington Ry. & Nav. Co

Deceased crossed the railroad at Porter's crossing, made the turn on the west side of the track, drove along the highway past the orchard, and was in the act of driving across the railway track at Shaw's crossing, when a locomotive, coming from the same direction as he, collided with his wagon and caused his death. Various diagrams, plats, and photographs were introduced in evidence, showing the location and condition of the railway and county road, and the contour of the ground in that vicinity. It appears beyond question, and is practically conceded, that if the deceased, at any point within 25 feet of Shaw's crossing, had looked along the track toward the engine, he could readily have seen for a distance of from a quarter to a half mile. The established and conceded physical conditions show that at any point between 50 and 100 feet a person could see along the track for a distance of 600 feet or more, and as one approached the crossing he could see much further. At any point on the highway between 100 and 475 feet of the crossing an engine could be seen at any place on the track for a distance of from 475 to six or eight hundred feet from the crossing. The accident occurred in the daytime. The deceased had lived in that neighborhood four years or more, and was thoroughly familiar with the crossing, and the conditions surrounding the same. He was a man 33 years old, and possessed of good eyesight and hearing. The evidence as to where he was when he first saw the approaching engine is somewhat conflicting. One witness says he was about 50 feet, "more or less," from the crossing, driving at a slow walk, when he looked toward the engine, and immediately commenced to whip his horses with the lines, in an effort to cross ahead of the locomotive. Others said that he was just about to the track, or crossing the same, and driving at a walk, when he looked, and saw the engine, and commenced to whip his horses. There was no evidence of his looking at any other point or at any other time prior to those just mentioned. There is no evidence that he stopped to "look and listen." The evidence as to the speed of the locomotive varied greatly, the estimates of the speed ranging from 12 to 60 miles per hour. There was a conflict in the evidence as to whether or not the whistle was sounded or the bell rung, and as to when and where. At the close of plaintiff's case, appellant challenged the sufficiency of the evidence, and moved for an order of the court withdrawing the case from the jury and dismissing the action. The trial court overruled this motion, to which ruling an exception was taken. At the close of all of the evidence, appellant again challenged its sufficiency, and moved to withdraw the case from the jury, and for a judgment of dismissal. This motion was also denied, and exception taken. The jury having returned a verdict in favor of respondent in the amount above mentioned, a motion for new trial was interposed, but denied by the court.

We do not think this verdict and judgment can be sustained by the evidence. It is shown conclusively that the deceased, for

Woolf v. Washington Ry. & Nav. Co

a considerable distance before crossing the railway track, could at any point, by looking, have seen the approach of the locomotive. It thus follows that either he did not look, or else he did look, and attempted to make the crossing ahead of the engine. In either case he would be clearly guilty of contributory negligence. The trial court, among other instructions, gave the following: "If you find from the evidence in the case that the deceased, before he reached the crossing, failed to look in the direction from which the engine was approaching and drove upon the crossing, then he was guilty of contributory negligence, and you must return a verdict in favor of the defendant. If you find from the evidence in the case that the deceased observed the engine approaching, and still endeavored to cross the track, and was killed thereby, then I instruct you that his conduct was contributory neglect, in the premises, and your verdict should be for the defendant. If the deceased looked, and saw the engine, and, endeavoring to beat the engine across the crossing, he was struck, he would be guilty of contributory neglect, and cannot recover in this action." In the light of these instructions, it is inconceivable how the jury could return a verdict for plaintiff, except upon the theory of an absolute disregard both of the evidence and the instructions. The doctrine of "look and listen" is well established, and is applicable to the facts in this case. In the case of *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, the Supreme Court of the United States said: "* * * The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed to both hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." The same court, in the case of *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, employs this language: "If in this case we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look, or, if he

Woolf v. Washington Ry. & Nav. Co

looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence." In the case of *Ladouceur v. N. P. R. Co.*, 4 Wash. 38, 29 Pac. 942, this court said: "While the testimony is uncertain and contradictory in some important particulars, yet, as it appears, it is a close question whether the plaintiff can escape the charge of contributory negligence. If he could have seen along the track for a long distance while on the level place before going down the incline, he certainly knew it, and should have looked, especially as he could not see an approaching train from the southward for any great distance from the crossing while going down the incline; and he must have known this also, as his testimony shows he was entirely familiar with the situation of the track and street in the vicinity. His counsel claims that the plaintiff did look to the southward for a train while on the level space, but we fail to find any testimony to that effect in the record. On the other hand, if he could not have seen along the track but a short distance, so there would have been no object in looking while on this level place, he certainly should have stopped and listened before crossing the track, unless the situation was such that he could not have heard a train any material distance therefrom if he had stopped. If there is ever a case where under other ordinary circumstances a man should stop and listen, it would be where he was unable to see the track or an approaching train for more than a very short distance, and had been so unable to see for some time before reaching the crossing." In 3 *Elliott on Railroads*, § 1179, that author says: "Where there is an omission of the duty of the traveler to look and listen before attempting to cross a railroad track, the general rule is that it is the duty of the trial court to direct a verdict for the defendant. In such cases the duty of the traveler is definitely fixed by law, and there is no question of fact to be submitted to the jury." In the case of *Christensen v. Union Trunk Line*, 6 Wash. 75, 78, 32 Pac. 1018, 1019, this court said: "There is no doubt, therefore, as to what the respondent did at and immediately prior to the accident. And we think that it was his own want of that reasonable care and watchfulness which the occasion demanded that brought about the injury of which he complains. In the first place, it was negligence on the part of the respondent to cross from the east side of the track to the narrow passage on the west without looking for the approach of the car which he knew was about to pass down the hill, if, in fact, as he claims, it was a dangerous place. And it was still more negligent for him to undertake to cross back when the car was so near him."

Respondent argues, however, that it must be presumed, in the absence of proof to the contrary, that the deceased did look and listen, and that he exercised due care in every regard, and cites many authorities to prove that this is the law. Were there no proof in the case bearing upon this matter, it would probably be

Woolf v. Washington Ry. & Nav. Co

proper to indulge this presumption. There is no question but that it may and should be invoked in appropriate cases. But this is not one of them. In this case one witness testified that he saw deceased look toward the engine when about 50 feet from the crossing, and that, instead of stopping his horses or turning them aside, he whipped them up and attempted to cross ahead of the engine. Others testified to substantially the same acts, but stated them to have occurred just as he was going upon or crossing the track. All of these witnesses stated that he whipped up his horses suddenly from a slow walk, and had them trotting, "loping," or jumping at the time of the collision. All of this would indicate that he had not seen or heard the train prior to such time. If he discovered the train in time to have stopped and avoided the collision, and did not do so, but attempted to beat the engine across the track, he certainly contributed to the cause of the collision. If he drove along slowly for a considerable distance, where he might at any time have looked and seen the approach of the engine, but neglected to do so until it was too late to avoid the collision, it is likewise certain that he contributed to the cause of the catastrophe. In either event, there is no room for indulging the presumption which respondent urges. Such a presumption is not to be invoked where there is competent, material evidence upon the question involved. In the case of *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, the United States Supreme Court said: "It is contended that the court erred in not submitting to the jury the issue as to defendant's negligence. Undoubtedly questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law under which they should be controlled. But it is well settled that the court may withdraw a case from them altogether, and direct a verdict for plaintiff or the defendant, as one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32, 1 Sup. Ct. 18, 27 L. Ed. 65; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 482, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Anderson County Commissioners v. Beal*, 113 U. S. 227, 241, 5 Sup. Ct. 433, 28 L. Ed. 966; *Schofield v. Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618, 15 Sup. Ct. 1125, 29 L. Ed. 224. 'It would be an idle proceeding.' this court said in *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287, to 'submit the evidence to the jury, when they could justly find only in one way.'" In the case of *Blakney v. Seattle Electric Co.*, 28 Wash. 607, 68 Pac. 1037, this court held that an inference would not be indulged which contradicted "unquestioned proof."

It is also contended that the submission of the case to the jury was justifiable on the doctrine of the "last clear chance."

Woolf v. Washington Ry. & Nav. Co

We do not think it applicable to this case. There was no evidence that those in charge of the locomotive had any reason to believe that the deceased was about to cross the track, until when within 50 feet thereof he began whipping his horses to get across. If they had seen him prior to that time, they would have been justified in believing that he would not attempt to cross the track so as to threaten a collision. In *Christensen v. Union Trunk Line*, supra, this court said: "It was undoubtedly the duty of the motorman in charge of the car to use all reasonable precautions to prevent injury to the respondent, but it was not negligence on his part not to anticipate that the respondent, who was traveling on the public highway in the same direction, and by the side of the railway track, would suddenly undertake to cross the track in front of the car. He had a right to presume that the respondent would remain off the track, and not knowingly place himself or his property in imminent danger. And he was not bound to regulate his speed at such a rate as would certainly avoid injury to any one who might attempt to cross the road in an unreasonable and improper manner." In the case of *Helber v. Spokane Street Ry. Co.*, 22 Wash. 319, 322, 61 Pac. 40, 41, this court, speaking by Mr. Justice Dunbar, used this language: "The universal knowledge of this fact has established a custom, which ought in justice to have the force of law, making it the duty of the party who can more easily and readily adjust himself to the exigencies of the case to do so, and to stop or turn to avoid a collision; and the motorman has the right to presume that such duty will be performed."

In the case at bar it was not shown that anything was done that precipitated, or omitted that could have avoided, the collision, after the discovery was made that deceased was attempting to cross. There was no evidence showing any negligence in this particular. It is contended that those in charge of the engine should have seen Mr. Woolf sooner, and noticed that he was unmindful of the engine's approach, and should have stopped or checked their speed before it was too late. If it was negligence, imputable to the engine operatives, not to have sooner seen deceased, it was likewise negligence for him not to have seen the engine. He had as unobstructed a view as they. His hearing, also, should have apprised him of their approach. Certainly their negligence was no greater than his. Assuming, as we must, that they were negligent, it nevertheless appears conclusively that his negligence contributed proximately to the cause of the unfortunate calamity. The doctrine of comparative negligence does not obtain in this state. *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84.

But respondent's counsel argue with ability and much ingenuity that the question of contributory negligence was for the jury, upon all of the evidence of the case, and that, having passed thereupon, its verdict should be conclusive upon the court. To this we cannot assent. There are many cases where the verdict

Woolf v. Washington Ry. & Nav. Co

of the jury is legally and properly conclusive. But where it clearly appears that the jury has disregarded both the evidence and the instructions of the court, its verdict should have no binding force. To uphold such verdicts is not only to do an injustice to the injured party, but tends to encourage unmeritorious litigation, to handicap litigants with meritorious cases, and to deprive our courts of that confidence and respect which should ever be maintained. There is no reason why a verdict should be respected when the record shows conclusively that it is not entitled to respect. Our law is no respecter of persons. The old and young, rich and poor, great and small, corporation and individual, are equally entitled to their rights before the law; and, if they do not secure them, there is something wrong, not with the law, but with its administration. If a trial judge disregards the evidence and law in a given case, and makes a decision showing it to be the result of sympathy, bias, prejudice, or other improper consideration, the appellate court does not hesitate to review and reverse his action. We are aware of no reason why the same character of conduct and decision on the part of a jury should be any more sacred. It is doubtless true that most juries are conscientious and try to be fair and honest. The same is true of most judges. But this constitutes no reason why the occasional unjust and illegal verdict of the one, or like decision of the other, should be permitted to stand. Juries are no more above the law than are judges or other officials or persons. This should be understood and recognized in the administration of justice. Every litigant, regardless of the class of litigation to which his case belongs, is entitled to a fair and impartial trial, and to have substantial justice meted out. Judges and juries are instruments of the law, intended to guaranty such rights and bring about such results so far as may be practicable. When that purpose is thwarted either by outside influence or inward delinquencies, a wrong is done that should be corrected, if correction is possible. This court has frequently held that verdicts contrary to what all reasonable men ought to find upon the evidence, or obnoxious to conceded or undisputed facts, should not be permitted to stand. *Week v. Fremont Mill Co.*, 3 Wash. St. 629, 29 Pac. 215; *O. R. & N. Co. v. Egley*, 2 Wash. St. 409, 26 Pac. 973, 26 Am. St. Rep. 860; *French v. First Ave. Ry. Co.*, 24 Wash. 83, 63 Pac. 1108; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Jennings v. Tacoma, etc., Co.*, 7 Wash. 275, 34 Pac. 937; *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126; *Wilson v. N. P. Ry. Co.*, 31 Wash. 67, 71 Pac. 713; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Olson v. McMurray, etc., Co.*, 9 Wash. 500, 37 Pac. 679; *Blakney v. Seattle Electric Co.*, *supra*; *Hamlin v. Columbia & P. S. Ry. Co.* (decided March 11, 1905) 79 Pac. 991; *Anderson v. Inland Tel., etc., Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410. In the case of *O. R. & N. Co. v. Egley*, *supra*, this court, speaking by Mr. Justice Dunbar, said: "Where there is no conflict of testimony on material points, and there is no testimony tending to establish a fact, the establishment of

Woolf v. Washington Ry. & Nav. Co

which is necessary to warrant a verdict, the court will not hesitate to interfere in the interests of justice and reverse the judgment." In the case of *McQuillan v. Seattle*, 10 Wash. 466, 38 Pac. 1120, 45 Am. St. Rep. 799, this court said: "There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law. * * * The first is where the circumstances of the case are such that the standard of duty is fixed and the measure of duty defined by law, and is the same under all circumstances. * * * And the second is where the facts are undisputed, and but one reasonable inference can be drawn from them." Citing *Cooley on Torts*, 670, 671; 2 *Thompson on Negligence*, §§ 1236, 1237. In *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98, this court, speaking by Mr. Justice Mount, said: "It is true that questions of this kind are usually questions of fact for the jury, but, where the facts and circumstances surrounding the case are such that reasonable men could not reasonably and properly find negligence therefrom, then it is the duty of the court to order a nonsuit."

The argument that contributory negligence involves the question of what an ordinarily prudent man would do under all the circumstances, and consequently presents a question solely for the jury, is, when applied to the case at bar, unsound, in this: in railroad-crossing cases the law has prescribed "looking and listening" as precautions essential to "ordinary care" or "ordinary prudence." Hence, as a matter of law, a man crossing a railway track without looking and listening cannot be held guiltless of negligence, except in rare cases, under extraordinary conditions, none of which obtain in this case. But respondent's counsel say that the law does not fix the particular place where a person must look and listen. "The rule [that a party should look] contemplates that this should be done at a time and place where the reasons upon which it is founded can be made effective. When the law requires steps of diligence and care, it will not be satisfied by the substitution therefor of vain and useless efforts." *Snider v. New Orleans Co.*, 48 La. Ann. 1, 18 South. 695. When, therefore, the undisputed evidence and established physical facts show that at any point within 100 feet of a crossing a person could see along the railway track for over 600 feet, and did not do so, or, doing so, undertook to rush across ahead of a rapidly approaching engine, it is difficult to conceive of any theory exempting him from the charge of negligence.

Appellant's challenge to the sufficiency of the evidence, made at the close of the case, and its motion for judgment, should have been sustained. Aside from the preponderance of the evidence, which was clearly with the defendant, the undisputed evidence and established and conceded facts constituted a complete bar to respondent's recovery. The verdict of the jury did not change the situation.

The judgment of the honorable superior court is reversed, with instructions to dismiss the action.

MOUNT, C. J., and DUNBAR and CROW, JJ., concur.

TOLEDO, ST. L. & W. R. CO. *v.* FENSTERMAKER.

(Supreme Court of Indiana, Nov. 29, 1904.)

[72 N. E. Rep. 561.]

Fires Set by Locomotives—Origin of Fire—Circumstantial Evidence.*—In an action against a railroad company for damages from fire alleged to have been caused by sparks from defendant's locomotives, where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive; that the wind was blowing from the railroad to the place where the fire started; and that the fire started soon after the locomotive passed—a conclusion that the fire was communicated by the locomotive is justified.

Same—Negligence—Spark Arresters—Burden of Proof.†—In an action against a railroad company for damages from fire, where the negligence alleged was in using insufficient or defective spark arresters, plaintiff has the burden of proving such negligence.

Same—Damages—Evidence.—Where the complaint in an action against a railroad company alleged the burning over of a meadow and a timber lot on plaintiff's farm by fire from a locomotive, in determining the amount of damages it was proper to ask a witness the value of the farm before the fire and immediately thereafter.

Same—Right of Testimony—Instructions.—In an action against a railroad company for negligently setting fire, it was proper to instruct the jury that it should take into consideration the opportunity of the several witnesses for knowing the things about which they testified, their demeanor while testifying, their interest or otherwise in the result, the probability of their several statements, and, from all the circumstances, determine on which side of the case is the preponderance of evidence.

Instructions.—Error in giving an instruction is not available to appellant where he requested an instruction involving the same question.

Appeal from Superior Court, Grant County; B. F. Harness, Judge.

Action by George Fenstermaker against the Toledo, St. Louis & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

Guenther & Clark, for appellant.

John A. Kersey, for appellee.

HADLEY, J. Suit and recovery by appellee for fire damages. There were two fires—one on October 8, 1901, and one on April 22, 1902. There are two paragraphs of complaint,—one based on the October and the other on the April fire—and each is predicated on the alleged negligence of appellant in using on its loco-

*See foot-notes appended to *Kansas City, etc., R. Co. v. Blaker & Co.* (Kan.), 10 R. R. R. 53, 33 Am. & Eng. R. Cas., N. S., 53.

†See foot-notes appended to *St. Louis, etc., Ry. Co. v. Lawrence* (Ind. Ter.), 9 R. R. R. 414, 32 Am. & Eng. R. Cas., N. S., 414; foot-note appended to *Chicago, etc., R. Co. v. Beal* (Neb.), 8 R. R. R. 468, 31 Am. & Eng. R. Cas., N. S., 468.

Toledo, etc., R. Co. v. Fenstermaker

motives a defective and insufficient spark-arresting device. The only assignment is the overruling of appellant's motion for a new trial. The grounds of the motion are the insufficiency of the evidence, the admission of improper evidence, and the giving and refusing of certain instructions.

It was in proof that the plaintiff's property was destroyed by fire as follows: His meadow on October 8th, and his wood and timber lot, known as the "sugar camp," on April 22d; both of these lots lying north and adjoining appellant's right of way, which at that place runs east and west. On October 8th, about noon, in a very dry time, and within five minutes after a freight train went west on appellant's railroad, a fire was discovered in the dry grass of the meadow, beginning about two feet north of the right of way. There was at the time a brisk wind blowing towards the northwest, and the fire developed and spread so rapidly that it burned over two-thirds of the field, and consumed twenty rods of rail fence, before it could be brought under control. On April 22, about 1 p. m., in an equally dry time, and within five minutes after a passenger train went west, a fire broke out in the southwest corner of appellee's sugar camp. There was a strong wind blowing from the southwest to the northeast. The surface of the sugar camp was covered with dry grass, weeds, leaves, and brush. The fire went rapidly and violently ahead of the wind, mounting into the tops of some of the trees, and reached and consumed a log dwelling house and all its contents, and destroyed about all the trees in the lot. Before the passage of the trains there was no fire at either place, nor in the vicinity, and had not been for an indefinite period, except that in a field of another owner, on the south side of the railroad, the northeast corner of which, but for the right of way, would have cornered with the southwest corner of appellee's sugar camp, a plowman a few minutes before the passage of the train and the origin of the fire, at a point somewhere about twenty rods west of the sugar-camp corner, had fired and burned two piles of cornstalks that had been bunched in harrowing down the stalks. There was positive testimony of two witnesses that no fire escaped from the burning stalks. There was no direct proof in either instance that fire escaped from the passing locomotives and ignited the grass on appellee's land. Aside from the locomotives, the evidence discloses no known actual or probable cause of either one of the fires. On the other hand, appellant produced testimony that all its locomotives were equipped with a device that was in common use on the railroads in the country, and which was the best and most-approved device known for arresting sparks, and which was in good condition on each of the locomotives at the time of the fires.

Appellant's counsel argue that, to recover, appellee must prove (1) that the fire which ignited the grass on appellee's premises came from the locomotives; and (2) that it escaped because of the defective or insufficient condition of the spark arrester.

Toledo, etc., R. Co. v. Fenstermaker

1. With respect to the first proposition, it is contended by appellant that there was no evidence that the grass at either time was ignited by sparks from the locomotives. Courts have seldom gone so far as to hold it essential for a plaintiff to prove by direct and positive evidence that the fire complained of escaped from a locomotive. Such fires usually occur in broad daylight, when flying sparks are not plainly visible, and in many cases it would be manifestly unfair and unreasonable to give judgment against a plaintiff because he failed to produce a witness who saw the fire escape from the locomotive and fall upon the combustible matter. This and the other courts of the country generally have recognized the juster rule that where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive; that the wind was blowing from the road to the grass; and that the fire broke out soon after the engine passed—these things are circumstances sufficient to justify the conclusion that the fire was communicated by the train. *Railroad Co. v. Ind. Horseshoe Co.*, 154 Ind. 322, 56 N. E. 766, and cases collected on page 333, 154 Ind., page 769, 56 N. E. Under the rule the evidence fully warrants the finding that the fires complained of were set by appellant's passing trains. But, second, is it sufficiently shown that the fire escaped from appellant's engine through the company's negligence? The law recognizes the right of a railroad company to employ fire for the production of steam in the operation of its road, and, while the company is required to observe a high degree of care to prevent the escape of fire, yet when it has adopted and maintains, in good repair and condition, the device generally recognized and used by railroads as the best and most approved for the suppression of fire, it has done all the law requires of it; and if the engine equipped with such device is properly handled, and fire escapes notwithstanding such precautions, it must be regarded as an accident for which the railroad company is not liable. In the case at bar the complaint charges that the fires resulted from the negligence of appellant in using insufficient spark arresters. The burden is upon the plaintiff to prove the negligence charged. *Railroad Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285; *Railroad Co. v. Ostrander*, 116 Ind. 259, 263, 15 N. E. 227, 19 N. E. 110. But like the escape of fire, negligence may be established by circumstantial as well as by direct evidence, or by both. On behalf of the defendant there was testimony by two employees to the effect that they inspected the locomotives said to have communicated the fires, on the morning of the fires, before going out, and also upon the following morning, and at all times found the spark arrester in each in good condition—"good as new," said one witness. The testimony of these two witnesses was given 18 months after the alleged inspections. Two railroad officials, introduced by appellant as expert witnesses, testified that a locomotive properly equipped with such a spark arrester as had been shown to be on the engines in controversy, in good condition and properly operated, will not

Toledo, etc., R. Co. v. Fenstermaker

throw out sparks that can be carried through the atmosphere 64 feet and ignite combustible substances. A third, in answer to the same question, answered that he did not know. There was other testimony relating to the same subjects, and from all of it the jury found as a fact, in answer to an interrogatory propounded to them by the court, "that the spark arrester in the engine that started the fire on October 8th and April 22d was not in good repair at the time of the fire." If it was a fact that the spark-arresting device, when in good condition and properly operated, would prevent the escape of fire in such quantity as could be borne 64 feet and set fire to the grass—and it was shown that fire did escape and ignite the grass that distance from the road—the escape of the fire would be very powerful evidence that the device was in bad or an insufficient condition. At all events, we think it sufficient to justify the jury in finding the negligence alleged in the complaint established.

2. Appellee alleges in one paragraph of the complaint that he is the owner of certain specifically described real estate; that appellant's railroad traverses it; that on October 8th there was on said tract a clover field of the value of \$100, and a fence of the value of \$50, which on said day were destroyed by fire through the negligence of appellant, and the destruction of said property was to the appellee's damage of \$150. In another paragraph containing the same general averments, it was added that on April 22d there were growing on the described premises 1,000 sugar, oak, beech, and other trees, of the value of \$1,000, which were destroyed, etc., and by the destruction of which the plaintiff was damaged \$1,000, for which he asks judgment. On the subject of damages the court permitted a witness, over the objections of appellant, to answer the following question: "State what that farm was worth immediately before that fire?" The witness answered that the farm was worth \$80 or \$90 per acre before the fire, and immediately after the fire \$1,000 less. The ground of objection was that the damages claimed are to the sugar camp, and that no such special damages are alleged to have accrued from a destruction of the trees as will enable appellee to prove damages to the farm generally. We do not see the force of appellant's objection. It was perfectly proper to allege and prove the elements of damage to the farm as a farm; that it had growing on it, as a source of wood and timber supply to the farm, wood and timber trees, which were destroyed. The fact that the value of the timber was alleged did not change the character of the proof, nor make the averment a claim for damages to the wood and timber lot, as distinguished from the whole tract as a farm. There was no effort to prove the value of the timber. The destruction of the growing trees and clover was an injury to the freehold, and there was no error in allowing the witness to answer the question.

3. Appellant complains of the giving of instructions numbered 1, 2, 3, 9, 10, 14, 17, and 18. By No. 1 the court directs the jury

Toledo, etc., R. Co. v. Fenstermaker

that it should take into consideration the opportunities of the several witnesses for knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any shown, in the result of the suit, the probability or improbability of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side of the case is the weight or preponderance of the evidence. Nos. 2 and 3 were to the same effect, and all fully sustained by *Fifer v. Ritter*, 159 Ind. 11, 64 N. E. 463, and *Strebin v. Laven-good* (Ind. Sup.) 71 N. E. 494. No. 9 is to the effect that if it is found that the fires were set by means of sparks which escaped from the engines, and were blown a distance of 60 or 70 feet into the clover and grove of the plaintiff, such fact might be properly considered in determining whether the spark arresters were in proper condition. Even if improper, under the state of the evidence, the giving of this instruction does not constitute reversible error. No. 10 is objected to because not pertinent to the evidence. There was evidence introduced to which the instruction would have been applicable, but for some reason it was subsequently withdrawn. If it was error to give this instruction, the error is not available to appellant, because the court repeated the same charge, in substance, in No. 8 given as requested by appellant. We have carefully examined Nos. 14, 17, and 18, and compared them with the whole body of the instructions, and we find that each correctly stated the principle involved, and, taken as a whole, the instructions were quite as favorable to appellant as it had the right to ask. The court refused to give instructions 1 and 4 requested by the defendant. The first directed the jury to return its verdict for the defendant. This was correctly refused. The fourth was in these words: "You are instructed that the burden of proof is upon the plaintiff to prove all the material allegations of one or more paragraphs of his complaint by a fair preponderance of the evidence. In this case, if the evidence is evenly balanced or preponderates in favor of the defendant on any material allegation, then your verdict should be for the defendant as to that paragraph of the complaint containing an allegation in support of which the evidence is evenly balanced, or on which the preponderance is in favor of the defendant." This the court modified and gave as follows: "You are instructed that the burden of proof is upon the plaintiff to prove all the material allegations of one or more paragraphs of his complaint by a fair preponderance of the evidence. In this case, if the evidence is evenly balanced or preponderates in favor of the defendant on any material allegation, then your verdict should be for the defendant as to such allegation." In the fourth instruction given as requested by the plaintiff, the court had previously directed the jury that the plaintiff, in order to recover on any paragraph of his complaint, must prove all the material averments of such paragraph by a preponderance of the evidence. In the first

Clark v. Great Northern Ry. Co

clause of the instruction as modified, the court restated the same thing, and the language in the latter clause to the effect that, if the evidence was evenly balanced or preponderated in favor of the defendant on any material allegation, their verdict should be for the defendant as to such allegation, could not have misled them. Under the clear and repeated statements of the court, the jury could not have misunderstood that a finding for the defendant on a material allegation was equivalent to a finding for it on the paragraph of complaint embracing such allegation.

We find no error. Judgment affirmed.

CLARK v. GREAT NORTHERN RY. CO. et al.

(Supreme Court of Washington, March 22, 1905.)

[79 Pac. Rep. 1108.]

Trespasser—Ejection from Train—Use of Force.*—In removing a trespasser from a train, the employees in charge thereof may use such force as appears reasonably necessary to effect their purpose.

Same—Same—Same.—Where one sues for injuries alleged to have been caused by the use of excessive force in expelling him from a train on which he was trespassing, the jury should not weigh with too much nicety the degree of force used in expelling him.

Setting Aside Verdict.—On a motion for new trial under the statute authorizing a new trial for insufficiency of the evidence to justify the verdict, where the trial court, after giving full consideration to the testimony in the light of the verdict, is still satisfied that it is against the weight of the evidence and that substantial justice has not been done, it is its duty to set the verdict aside, and its failure to do so is reversible error.

Appeal from Superior Court, Spokane County; George W. Belt, Judge.

Action by Thomas J. Clark against the Great Northern Railway Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

M. J. Gordon and C. A. Murray, for appellants.

Merritt & Merritt and Barnes & Latimer, for respondent.

PER CURIAM. This case was before this court on a former appeal. The opinion will be found in 31 Wash., at page 658, 72 Pac., at page 477. In addition to the statement of facts contained in the former opinion, we deem it sufficient to say that the plaintiff was a trespasser on the Great Northern train out of Spokane, and refused to leave the train at the request of the conductor in charge, who is one of the defendants in this action. The plaintiff was forcibly ejected from the train at Hilliard, in Spokane county, and brought this action against the railway company and

*See foot-notes appended to *Powell v. Erie R. Co.* (N. J.), 13 R. R. 615, 36 Am. & Eng. R. Cas., N. S., 615.

Clark v. Great Northern Ry. Co

its conductor to recover damages for injuries received at the time of his expulsion.

Only two questions are presented by the pleadings: One, the question of excessive force used in ejecting the plaintiff from the train; the other, the amount of damages sustained. The plaintiff had judgment below, and defendants appeal. All the errors assigned relate to instructions given or requested instructions refused, and to the refusal of the court to grant a new trial. It was conceded at the trial that the respondent was a trespasser on the train, and offered resistance to his removal. Under these circumstances the appellants requested the court to charge the jury that they would only be liable in case of palpable and perfectly apparent use of force beyond that which was necessary to be used in overcoming the resistance offered by the respondent, and that there could be no recovery for injuries received except such as were willfully, wantonly, or maliciously inflicted. On the other hand, the court instructed the jury that the appellants were liable for the use of force beyond that which was necessary to be used in overcoming the resistance offered by the respondent, and that the appellants were not liable for injuries received, except such as were the result of the use of excessive force. The true rule is that, in removing trespassers from a train, the employees of the company may use such force as appears reasonably necessary, under all the circumstances, to accomplish the end in view; and, if the trespasser offers forcible resistance, a jury should not weigh with too much nicety the degree of force resorted to. We think the instructions given in this case fairly come within the above rule, but, inasmuch as the judgment must be reversed on other grounds, it is unnecessary to comment further on the instructions, as the same questions will not arise again.

In passing upon the motion for a new trial, the court below used the following language: "I am compelled, though reluctantly, to deny the motion for a new trial in this case. My reluctance arises from the fact that, in my opinion, the weight of the evidence did not sustain the contention that excessive force was used in ejecting plaintiff from the train; but that issue was submitted to the jury, and was decided in favor of the plaintiff, and as, under our judicial system, the trial judge in a civil jury case has little more power or authority than a 'mentor at a town meeting,' I am not at liberty to disturb the jury's finding on that issue." It appears from the foregoing statement that the trial court labored under an entire misapprehension as to its powers and its duties. Our statute provides that a new trial may be granted, among other grounds, for insufficiency of the evidence to justify the verdict; and this power must be exercised by the trial courts, if at all. These courts should take due care not to invade the legitimate province of the jury; but if, after giving full consideration to the testimony in the light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done

Clark v. Great Northern Ry. Co

between the parties, it is its duty to set the verdict aside. In *Railway Co. v. Kunkel*, 17 Kan. 172, Mr. Justice Brewer says: "The judge has the same opportunity as the jury for forming a just estimate of the credence to be placed on the various witnesses, and, if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside." In *Reid v. Insurance Co.*, 58 Mo. 421, the court says: "Where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, it should never hesitate in exercising the power and giving the aggrieved party a new trial." In *Dickey v. Davis*, 39 Cal. 565, the court says: "If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony." In *Railway Co. v. Ryan* (Kan. Sup.) 30 Pac. 109, the court says: "When the judgment of the trial judge tells him the verdict is wrong, whether from mistake or prejudice or other cause, no duty is more imperative than that of setting it aside, and remanding the questions at issue to another jury. While the case is before the jury for their consideration, the jury are the exclusive judges of all questions of fact; but when the matter comes before the court upon a motion for a new trial, it then becomes the duty of the trial judge to determine whether the verdict is erroneous. He must be controlled by his own judgment, and not by that of the jury." In *State v. Billings*, 81 Iowa, 100, 46 N. W. 862, the court says: "To a valid judgment the law requires, first, that there shall be a verdict upon evidence to satisfy the minds of the jury, and, second, that the judge who presides at the trial shall believe that the evidence is sufficient to justify the finding." In *Railway Co. v. Ryan*, supra, in disposing of a motion for new trial, the trial judge, among other things, stated "that the verdict did not meet the approval of his judgment," that it was "largely in excess of what would be full compensation to the owner of the land," that he would "stand out of the way," and then overrule the motion. In passing upon such ruling, the appellate court said: "In the case at bar the opinion of the trial judge is preserved in the case-made. Therefore it is properly here for our consideration. This court has the right to ascertain, from a record made up and certified to in due form, whether the verdict of the jury has the approval of the trial judge. He has the same opportunity to see and hear the witnesses as the jury; and if, in his judgment, the jury have erred, it is proper, in disposing of a motion for a new trial, for the trial judge to so state. If he disapproves the verdict in as strong language as quoted, this court, having that knowledge from the record, will not hesitate to reverse the judgment and grant a new trial." In *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804, this court says: "Generally, where the record discloses that the trial court has expressed the opinion that the verdict is not sustained by the evidence, or is contrary to the weight of the evidence, and refuses to grant a new trial, the

Clark v. Great Northern Ry. Co

appellate court will reverse the judgment for an abuse of discretion (*Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738, and cases cited); but it must appear that the trial judge has this opinion; it must appear that he believed that the verdict was clearly against the weight of the evidence." The numerous cases cited by the respondent from this court are not in point. The rules governing trial courts and appellate courts in this regard are wholly different. The distinction is clearly pointed out in the case of *Dewey v. Railway Co.*, 31 Iowa, 377, where the following language is used: "We therefore avail ourselves of this occasion to correct what we understand to be a very general misapprehension on the part of district and circuit judges in respect to the rule as to new trials in the nisi prius courts. This court has repeatedly declared the rule for itself (and such is the rule in most appellate tribunals) that, where the evidence is conflicting and the nisi prius court has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, that we will not interfere. And this because, first, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses, and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and, third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions, but, generally, only the substance of their testimony, and often in the language of the attorneys interested in the cause. A mention of these considerations upon which the rule for the appellate courts is (in part) founded is sufficient to show that the rule ought not and does not have any application whatever to the nisi prius courts. Those courts ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury has from any cause failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted." For the foregoing reasons, we think the trial court erred in two respects in denying the motion for a new trial: First, because it expressed an opinion at variance with its ruling; and, second, because it failed to properly exercise the power and discretion vested in it.

Numerous affidavits and counter affidavits were filed tending to show misconduct on the part of the jury, and the reverse. These questions will not arise on a new trial, and the court will not consider them.

For the error in denying the motion for a new trial, the judgment is reversed, and a new trial granted.

McGEE v. BOSTON ELEVATED RY. CO. (two cases). McNEILL v. SAME. DOWNEY v. SAME.

(Supreme Judicial Court of Massachusetts, Suffolk, March 4, 1905.)

[73 N. E. Rep. 657.]

Injury from Snow Falling from Elevated Railroad Structure—Evidence.—In an action for personal injuries received while passing along a street by snow falling from defendant's elevated railroad tracks, evidence held not to show that the snow came from defendant's structure.

Same—Burden of Proof.—One suing for personal injuries received by reason of snow falling down on him from defendant's elevated railroad track has the burden of proving that the snow came from such structure.

Exceptions from Superior Court, Suffolk County; Albert Mason, Judge.

Separate actions by Catherine McGee against the Boston Elevated Railway Company, by Rosanna McGee against the same defendant, by Sarah McNeil against the same defendant, and by Mabel Downey against the same defendant. Verdict for defendant in each case, and each plaintiff brings exceptions. Overruled.

J. J. Feely and Roger Clapp, for plaintiffs.

Endicott P. Saltonstall and Sanford H. E. Freund, for defendant.

LATHROP, J. These are four actions of tort brought by four girls for personal injuries alleged to have been received by them on December 9, 1901, while passing along the sidewalk of Harrison avenue, in Boston, near Beach street. The declaration in each case alleges the negligence of the defendant, its agents and servants, in throwing or causing to fall upon the plaintiff from the overhead tracks of the defendant a large quantity of snow and ice. In the superior court the cases were tried together, and at the close of the evidence for the plaintiffs the judge directed a verdict for the defendant in each case, and the cases are before us on the plaintiff's exceptions.

It seems to us that the judge was clearly right in giving the ruling excepted to. The only witnesses called were the plaintiffs and the weather forecaster in the employ of the United States in Boston. The plaintiffs testified merely to the fall of a quantity of snow, which knocked them down, while they were walking under the elevated structure of the defendant. The weather forecaster testified that it appeared from his records that there was a snowstorm on December 3d and 4th, amounting in all to nine inches; that the temperature was below freezing on the 5th, 6th, and 7th; that it did not rise above the freezing point until midnight; and that it had reached the thawing point at 8 p. m. on the 8th, and was thawing slightly until the following morning at 8 o'clock, when he should expect it to thaw substantially.

McGee v. Boston Elevated Ry. Co

While the testimony of the last witness shows a thaw on the morning of the accident, the testimony of the plaintiffs fails to show where the snow came from, whether from the elevated structure or from the buildings abutting on the sidewalk, which were owned by other persons than the defendant. It is purely a matter of conjecture where the snow came from. The burden of proof was upon the plaintiffs to show that the snow came from the defendant's structure, and this they have not done. *Kendall v. Boston*, 118 Mass. 234; *Corcoran v. Boston & Albany R. R.*, 133 Mass. 507; *Wadsworth v. Boston Elevated Ry.*, 182 Mass. 572, 66 N. E. 421, and cases cited. At the argument it was contended that the snow might have come from the roof of a building occupied by the defendant and used by it as a station from which steps proceed to the tracks above. This building appears from the photographs put in evidence by the plaintiffs to be a small, one-story building with a flat roof. It is obvious that snow could not have come from this building by force of gravity, and there is no evidence that the roof was being cleared by manual labor. The whole matter is left still in conjecture.

Exceptions overruled.

INDEX TO NOTES.

FELLOW SERVANTS.

Superior Servant Limitation of Fellow-Servant Rule.

Agent with authority to discharge, direct, and control—hand ordered to work in dangerous place, 160.

Alabama, 151.

Alaska, 152.

Application of California Statute, 153.

Arkansas, 152.

Arizona, 152.

Assistant road master and section hands—absolute power to hire and discharge, 173.

Authority to assign to duties not within scope of special duties, 156.

Authority to command, 187.

Authority to employ and discharge, 198.

Authority to hire and discharge makes foreman a vice principal only with respect to selecting or retaining servants, 193.

Authority to hire and discharge not the test, 183.

Boss of roundhouse and laborer—negligence in performing manual labor, 178.

Boy ordered by foreman to perform perilous act outside scope of employment, 155.

Brakeman and engineer—absence of conductor—authority not assumed by engineer, 195.

Brakeman required to operate brakes “according to circumstances and signals of engineer,” 190.

California, 153.

Car repairer injured in obeying direct order of foreman, 198.

Car-starter and gripman—order to move car—question for jury, 159.

Caving in of sewer—defective bracing—negligence of street superintendent—foreman in immediate charge, 179.

Caving in of sewer—injury to laborer—failure of superintendent to use shoeing, 171.

Character of negligent act immaterial, 189, 199.

Character of negligent act the test, 173, 190, 193, 202.

Charge and control of gang engaged in particular service, 159.

Charge of wrecking crew—propping car floor on track—negligent directions, 160.

Collision—death of fireman—negligence of train dispatcher, 173.

Colorado, 154.

Conductor and brakeman—authority to command, 166.

Conductor and engineer—doctrine of Ross case approved, 169.

Conductor and fireman of freight train—authority to direct and control, 195.

Conductor not fellow servant of fireman, 204.

Conductor not fellow servant of his trainmen, 157.

Conductor not fellow servant of member of his train crew, 201.

Conductor of construction train—injury to hand ordered to jump from moving car—negligence in securing pawl, 169.

Conductor of construction train—power to hire, discharge and command—train dispatcher's order misread—collision, 161.

Conductor of construction train vice principal of brakeman, 204.

Conductor vice principal, 187.

Conductor vice principal of other members of train crew, 205.

FELLOW SERVANTS—Continued.

- Connecticut, 155.
- Construction of bridge—negligence in placing wedges, 162.
- Construction of ship—carpenter acting as foreman's intermediary in signalling to hoist or lower timbers, 156.
- Construction work—supervision and direction of general foreman—authority to hire and discharge—transporting to and from work, 155.
- Control of department, and authority to hire and discharge, 169.
- Control of gang carrying on distinct branch of business—existence of immediate superior immaterial, 160.
- Control of workmen in carrying on particular branch of business, 159.
- Cooley on Torts, 147.
- Cotton factory—duty to hire and discharge, and to provide and maintain machinery, 194.
- Cross references, 146.
- Death of car-wiper—collision—negligence of foreman with authority to decide which cars should be placed on cleaning track, 160.
- Death of engineer—collision—failure of conductor to send out flagman, 199.
- Death of fireman from explosion of boiler—violation of rule—failure of engineer to be on hand, 197.
- Death of minor—naked light—explosion—fellow servant of pit boss working under superintendent, 184.
- Death of section hand—negligence of conductor of construction train—hands ordered to work in cut when another train due, 181.
- Death of section hand—negligence of foreman—improper order, 160.
- Definition, 146.
- Delaware, 155.
- Derailment of hand car—injury to section hand—section foreman allowing keg to fall off, 179.
- Distinction between vice principal and superior servant, 162.
- Doctrine of Baugh case, 149.
- Dual capacity doctrine, 178.
- Dual capacity doctrine of Illinois—status of foreman causing injury to employee under him, 159.
- Employee injured while pushing car—negligence in causing switch to be thrown—foreman with absolute control of hands, 167.
- Employee superintending digging of trench and laborer are, *prima facie*, fellow servants, 171.
- Engineer and brakeman—acting under orders, 195.
- Engineer and fireman, 159, 180.
- Engineer superior of fireman—construction of Ohio statute, 190.
- England, 207.
- Entire charge of district department, 192.
- Failure to define duty and authority with respect to each other, 163.
- Fall from trestle—failure of foreman of construction gang to properly secure—personal negligence, 197.
- Fall of defective derrick—negligence of foreman charged with duty of reporting defects, 167.
- Fall of embankment—injury to hand—negligence of foreman with power to command, 177.
- Fall of frame—failure of foreman to properly brace, 183.
- Fall of scaffold—defective plan—negligence of agent having general control of working plant, 156.
- Fall of trestle—failure to properly brace—negligence of foreman of construction gang—authority to hire and discharge, 175.
- Fear of dismissal, 186.

FELLOW SERVANTS—Continued.

- Fireman, acting as engineer, and brakeman, 168.
- Foreman and laborer—management of entire business or of distinct department, 170.
- Foreman assisting in replacing chain on pulley, 165.
- Foreman directing work, 177.
- Foreman directing work under instructions of division road master—moving car without warning, 174.
- Foreman engaged in manual labor, 165.
- Foreman fellow servant of those under his supervision, 162.
- Foreman in charge of distinct piece of work, 179.
- Foreman in charge of dynamite—negligence in preparing cartridge—explosion, 155.
- Foreman in charge of gravel train—power to hire and discharge, 172.
- Foreman of bridge carpenters—member of gang ordered to dangerous position, 153.
- Foreman of bridge gang with power to hire, discharge, and control hands, 148.
- Foreman of car repairers—injury to hand under car—negligence in moving other cars without warning, 166.
- Foreman of construction gang—inconsistent order, 152.
- Foreman of construction gang—power to hire, discharge and direct, 151.
- Foreman of construction work as head of separate department, 203.
- Foreman of gang breaking ore in mine—allowing ore to run into chute without warning, 149.
- Foreman of gang excavating ditch—authority to hire, discharge, and command—injury to hand ordered into dangerous place, 176.
- Foreman of gang loading hand car—injury from fall of load, 174.
- Foreman of gang moving cars on siding—mere authority to command and direct, 202.
- Foreman of gang taking gravel from pit, 201.
- Foreman of job, 169.
- Foreman of logging crew vice principal of crew of donkey engine—selection of insufficient swamp hook, 203.
- Foreman of machine shop with mere authority to give orders, 148.
- Foreman of mine, 152.
- Foreman of quarry—authority to make and abrogate rules and to appoint foreman of squads, 202.
- Foreman of repair shop in charge of wrecking crew, 151.
- Foreman of track men, 175.
- Foreman of track repairers—failure to warn before giving order to bear down on rail, 180.
- Foreman ordering use of defective chain, 192.
- Foreman—Power to command—authority to discharge subject to approval, 204.
- Foreman subordinate to another having power to hire and discharge and to give working directions, 206.
- Foreman supporting column as injured employer's substitute, 165.
- Foreman with authority to report delinquences and to control and direct—absence of power to hire and discharge, 202.
- Foreman with mere authority to send to appointed tasks and to recall from work, 195.
- Full control of particular branch of master's business, 173.
- Full power to manage business, 173.
- Gang boss working under orders of superintendent, 192.
- Gang moving damaged cars—negligence of foreman subject to yard master's orders, 175.
- General supervision of the work retained by master, 187.

FELLOW SERVANTS—Continued.

- Georgia, 155.
- Hand directing work not general superintendent, 156.
- Idaho, 158.
- Illinois, 158.
- Indiana, 161.
- In charge of distinct department, 163.
- In charge of timber yard—authority to hire and discharge, 166.
- Incompetent employee assigned task created by emergency—power to hire and discharge, 156.
- Injury to brakeman—failure of conductor to take prescribed precautions in running train over dangerous grade, 186.
- Injury to brakeman—negligence of conductor of freight train, 181.
- Injury to brakeman—negligence of engineer in stopping train, 165.
- Injury to brakeman—parting of train—conductor on other section—effect upon superiority or control, 190.
- Injury to car coupler—negligence of yard master—backing train without warning—authority to hire and command, 186.
- Injury to car repairer—negligence of foreman with mere authority to direct, 164.
- Injury to car repairer working under car—negligence in moving another car—foreman assisting in repairing, 189.
- Injury to employee ordered into dangerous place—work outside scope of employment, 176.
- Injury to engineer—negligence of conductor, 189.
- Injury to fireman—ordered by engineer outside scope of employment, 193.
- Injury to flagman of steam roller—negligence of foreman in frightening team, 193.
- Injury to hand digging trench—failure of superintendent to use shoeing, 171.
- Injury to hand—negligence of conductor of gravel train, 181.
- Injury to hand—negligence of foreman of carpenters—construction of culvert—removal of "center"—fall of arch, 185.
- Injury to hand—negligence of section boss—order to board moving car, 195.
- Injury to hand ordered to count shipping lumber in car—negligence of foreman in causing car to be moved—fall of lumber, 206.
- Injury to hand ordered to hold car to be backed against by another car—failure of superior to place stick in pockets, 199.
- Injury to hand riding to work on gravel train—negligence of engineer, 189.
- Injury to laborer—dangerous order—negligence of foreman, 182.
- Injury to laborer engaged in removing building—negligence of foreman ordering use of defective staging, 177.
- Injury to laborer—negligence of section foreman and engineer—failure to warn of approach of engine—absence of signals and head light, 180.
- Injury to laborer—negligence of section foreman in running hand car at excessive speed, 149.
- Injury to member of repairing gang—control of foreman—transporting to and from work on hand car, 181.
- Injury to member of switch crew—negligence of his foreman in sending cars against those he was uncoupling, 200.
- Injury to member of wrecking crew—wrong signal given by road master, 177.
- Injury to mine shift pusher—preceding shift ordered off by foreman of mine—unexploded blasts, 201.
- Injury to miner—failure of foreman to warn him of dangers of place, 201.

FELLOW SERVANTS—Continued.

- Injury to miner—negligence of person authorized to direct where to drill blast holes—power to hire and discharge, 184.
- Injury to seaman—breaking of triangle—negligence of mate in constructing and ordering use of appliance, 171.
- Injury of section hand—collision—negligence of road master, 179.
- Injury to section hand—defective hand car—failure of section boss to report defect—power to hire and discharge, 186.
- Injury to section hand going to work on hand car—collision—foreman with authority to recommend discharge, 184.
- Injury to section hand—negligence of foreman in causing sudden stoppage of hand car, 199.
- Injury to section hand—negligence of foreman in throwing back switch, 199.
- Injury to section hand—negligence of foreman performing manual labor, 197.
- Injury to section hand—negligent order of foreman—absence of authority to hire and discharge, 181.
- Injury to section hand ordered to jump from moving train—section master with authority to hire, discharge, and command, 187.
- Injury to servant ordered to certain position—attempt of section master to straighten fish-bar—authority to hire and discharge, 176.
- Injury to shoveler on gravel train—order to jump upon another car—negligence of foreman in widening distance—work outside scope of employment, 172.
- Injury to track hand—failure of boss to warn of approach of train, 192.
- Injury to track repairer—conductor of material train and foreman as vice principals, 179.
- Iowa, 163.
- Judge Dillon, 147.
- Kansas, 166.
- Kentucky, 168.
- Limitation rejected by weight of authority, 147.
- Loading railroad iron on flat cars, 162.
- Louisiana, 168.
- "McKinney on Fellow Servants," 147.
- Maine, 169.
- Management of master's business or of a distinct department, 173.
- Manager of quarry—hand ordered to put in blast before hole had cooled, 190.
- Manager or superintendent entrusted with all master's duties, 170.
- Manager with authority to command and have discharged, 168.
- Maryland, 170.
- Massachusetts, 170.
- Master only liable for negligence in discharging nonassignable duties, 203.
- Master liable where negligence occurs in exercising authority over subordinate—power to hire, discharge, and direct, 159.
- Master mechanic in sole charge of shop—exercise of power to command, 163.
- Master not liable for mere personal negligence of superior servant, 197.
- Master not liable for negligence of superior in working as co-laborer, 196.
- Master only responsible for negligence of foreman in discharging nonassignable duties, 191.
- Master only responsible for superior servant's negligence in dis-

FELLOW SERVANTS—Continued.

- charging master's duties, or consequences of superior's direct order in sudden emergency, 196.
- Mere authority over other employees, 164.
- Mere authority to direct other workmen, 155.
- Mere foreman, 187.
- Mere grade immaterial, 200.
- Mere inferiority in grade, 161.
- Mere selection of materials furnished, 192.
- Mere superiority of grade of negligent servant not the test, 170.
- Michigan, 172.
- Mine "fire boss"—authority to direct hands to work in another and safe place, 203.
- Minnesota, 174.
- Mississippi, 176.
- Missouri, 176.
- Montana, 180.
- Nebraska, 181.
- Negligence in superintending, directing or controlling workmen, 178.
- Negligence of boss or foreman an assumed risk, 202.
- Negligence of foreman acting as colaborer, 158.
- Negligence of foreman—general control and supervision retained by master, 185.
- Negligence of foreman in executing work designed and directed by vice principal, 184.
- Negligence of foreman in ordering hand to work where blasts had failed to explode, 191.
- Negligence of foreman in performing manual labor, 153, 189.
- Negligence of foreman in throwing box on pile of posts, 193.
- Negligence of foreman of gang erecting shed, 191.
- Negligence of foreman of mine—laborer injured by explosion—unexploded blast, 180, 181.
- Negligence of foreman or superintendent, 171.
- Negligence of subforeman—collision between lever car and dump car—authority to direct when, where, and how to work not shown, 197.
- Negligence of submanager or foreman, 171.
- Negligent order, 160.
- New Hampshire, 183.
- New Jersey, 183.
- New Mexico, 184.
- New York, 185.
- Nonassignable duties, 154, 164, 191.
- Nonexercise of authority to give orders, 195.
- North Carolina, 186.
- North Dakota, 187.
- Ohio, 188.
- Ohio rule quoted and approved, 182.
- Only responsible for vice principal's performance of master's personal duties, 165.
- Order to perform act outside scope of employment, 151.
- Ordered into place of unusual danger, 151.
- Oregon, 190.
- Pennsylvania, 191.
- Person directing operation of appliance superior of person working under his orders and directions, 169.
- Person in charge of laborers engaged in unloading ship—unsafe staging, 169.
- Pile shoved against hand—failure of foreman to block—authority to hire and discharge, 188.
- Power to control, direct, or discharge not the test, 161.
- Power to dismiss at pleasure, 151.

FELLOW SERVANTS—Continued.

- Power to employ and discharge, 172.
- Power to hire and discharge no conclusive test, 178.
- Power to hire, discharge, and command—character of negligent act immaterial, 187.
- Quarry hands—hands assuming lead, and directing, 191.
- Rationale of majority doctrine, 152, 183.
- Rationale of Utah doctrine, 200.
- Rhode Island, 193.
- Ross case—conductor of train in charge of district department, 150.
- Ross case criticised, 204.
- Ross case followed, 150, 157, 203.
- Ross case followed—conductor not fellow servant of flagman on his train, 194.
- Saving threatened bridge—control of hands called from different departments—choosing work, place and appliances, 162.
- Scope of note, 146.
- Section boss—power to hire, discharge and command, 186.
- Section boss—power to hire and discharge conferred through road master, 198.
- Section foreman and hands, 177.
- Section foreman—dual capacity—employing and discharging, 163.
- Section foreman in charge of train—mere authority to represent master in accordance with instructions, 174.
- Section foreman with power to hire, discharge, and control, 178.
- Section hand thrown from hand car—negligence of foreman in applying brakes, 149.
- Servants in different departments, 168.
- Shift boss in mine—miner ordered to work where unexploded blast, 206.
- South Carolina, 194.
- Substantial control of business and power to do all necessary acts, 190.
- Superintendent of construction work—power to hire and discharge—entire control of hands and appliances, 154.
- Superintendent of factory charged with duty of keeping machinery in order—negligence in starting planer, 172.
- Superintendent of mine not fellow servant of laborer under his orders, 201.
- Superintendent of mine with power to hire and discharge—injury to employee through negligence of engineer, 154.
- Superintendent with knowledge essential to safety of employees, 199.
- Superintendent with power to hire and discharge, and to provide and remove materials, 179.
- Superior and inferior co-operating, 192.
- Superior servant a vice principal, 182.
- Superior servant does not divest himself of responsibility by engaging in manual labor, 179.
- Superior servant represents master only in performing nonassignable duties, 204.
- Superior servant without the authority of a vice principal, 154.
- Temporary authority over other servants engaged in certain work, 160.
- Tennessee, 194.
- Tennessee decision reviewed—power to hire and discharge, 196.
- Texas, 198.
- Title or rank not the test, 175.
- Track foreman—power to discharge subject to supervisors approval—bound to follow minute directions as to use of track, 149.

FELLOW SERVANTS—Continued.

- Train dispatcher and engineer—authority to direct and control—
Ohio statute, 151.
- Train dispatcher and trainmen, 179.
- United States, 148.
- Use of unsafe tool suggested by foreman, 165.
- Utah, 200.
- Vermont, 201.
- Vice principal acting against objection of injured employee, 154.
- Vice principal acting under express orders, 192.
- Virginia, 202.
- Washington, 203.
- West Virginia, 204.
- When acts of foreman are merely acts of fellow servant, 166.
- Who are fellow servants, 168.
- Wisconsin, 205.
- Wyoming, 206.
- Yard boss of lumber yard—power to command—authority to hire
and discharge subject to approval, 203.
- Yard master and hands—authority to hire and discharge, 173.

GENERAL INDEX.

ACCIDENTS ON TRACK.

See CROSSINGS; DEATH BY WRONGFUL ACT; LICENSEES; RAILROADS; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

Contributory Negligence.

Intoxicated man, who seats himself on end of a cross tie, and there sinks into a drunken stupor, is negligent. *Ayers v. Wabash R. Co.* (Mo.), 470.

Person struck by train, which she should have seen in time, while walking on track, could not recover, although she testified that she used due care in trying to discover train. *St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.), 779.

Proximate cause of accident was the act of deceased in walking on street car track while affected by liquor. *Bugbee v. Union R. Co.* (R. I.), 128.

Question for jury where person was injured by reason of a collision between his vehicle and a street car. *Wood v. Boston Elevated Ry. Co.* (Mass.), 475.

Contributory negligence and negligence in failing to discover deceased's peril. *St. Louis, etc., Ry. Co. v. Evans* (Ark.), 788.

Duty of engineer to lookout for persons using track at point where it is habitually used as a footpath, to the railroad's knowledge. *Ayers v. Wabash R. Co.* (Mo.), 470.

Evidence.

Inadmissibility of evidence of certain facts, because of absence of evidence that other vehicle was on track until the instant of the collision. *Fagan v. Rhode Island Co.* (R. I.), 22.

Testimony that on a clear day one could see a "small object" at a certain place on a railroad track from a standpoint of a quarter or half mile is incompetent unless it is the result of an actual experiment. *Ayers v. Wabash R. Co.* (Mo.), 470.

Mere fact that an engine strikes a man lying on track at point habitually used, to the railroad's knowledge, as a footpath is not of itself sufficient to justify the inference that the engineer saw him, or failed to use ordinary care to discover him in time to prevent injuring him. *Ayers v. Wabash R. Co.* (Mo.), 470.

Negligence in operating street car, insufficiency of evidence. *Bugbee v. Union R. Co.* (R. I.), 128.

Negligence was a question for jury where person was injured by reason of a collision between his vehicle and a street car. *Wood v. Boston Elevated Ry. Co.* (Mass.), 475.

Railroad not chargeable with notice that a man is liable to be lying on track at point habitually used, to the railroad's knowledge, as a footpath. *Ayers v. Wabash R. Co.* (Mo.), 470.

Railroad was not chargeable with negligence, which rendered it liable for injury of woman struck by train, where required signals were given, and, when the woman was seen by engineer and fireman, she was walking beside the track at a safe distance, and, after she stepped upon the track, every thing possible was done to stop the train before it reached her. *St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.), 779.

Right of motorman to assume that traveler had exercised due care, charge that jury might consider that fact in determining whether motorman was guilty of willful wrong in running his car against

ACCIDENTS ON TRACK—Continued.

a team was properly refused for giving undue emphasis to a particular fact. *Montgomery St. Ry. v. Rice* (Ala.), 499.

Sufficiency of evidence that engineer discovered deceased on track in time to avoid injuring him. *St. Louis, etc., Ry. Co. v. Evans* (Ark.), 788.

Whether motorman was guilty of wanton or willful wrong in running his car against a mule was a question for jury. *Montgomery St. Ry. v. Rice* (Ala.), 499.

ACTIONS.

See **PERSONAL INJURIES**.

ACT OF GOD.

See **NEGLIGENCE; WATER AND WATERCOURSES**.

ADDITIONAL CHARGES.

See **CARRIERS OF FREIGHT**.

ADMISSIONS.

See **DEATH BY WRONGFUL ACT**.

ADMISSIONS OF AGENT.

See **CARRIERS OF FREIGHT**.

ADVERSE POSSESSION.

See **PUBLIC LANDS**.

AGAINST OWNER'S WILL.

See **EMINENT DOMAIN**.

AGENCY.

See **CARRIERS OF FREIGHT; CARRIERS OF GOODS**.

AGE OF EMPLOYEE.

See **MASTER AND SERVANT**.

AGENTS.

See **TICKETS AND FARES**.

AGREED VALUATION.

See **CARRIERS OF GOODS; CARRIERS OF LIVE STOCK**.

AID FROM CHILDREN.

See **PERSONAL INJURIES**.

AIR BRAKES.

See **NEGLIGENCE**.

ALIENATION.

See **PUBLIC LANDS**.

ALIGHTING AT INTERMEDIATE STATIONS.

See **CARRIERS OF PASSENGERS**.

ALIGHTING FROM MOVING CAR.

See **CARRIERS OF PASSENGERS**.

ALIGHTING FROM TRAIN FOR EXERCISE.

See **CARRIERS OF PASSENGERS**.

ALIGHTING PASSENGERS.

See **CARRIERS OF PASSENGERS**.

ANIMALS.

See FRIGHTENING TEAMS; STOCK, INJURIES TO.

ANIMUS.

See DAMAGES.

ANSWER AS EVIDENCE.

See DEATH BY WRONGFUL ACT.

ANTICIPATING NEGLIGENT SPEED.

See CROSSINGS.

APPEAL.

See NEGLIGENCE.

Review.

Competency of witness to testify as to speed of train was for the determination of trial court. *Borneman v. Chicago, St. P. M. & O. Ry. Co.* (S. Dak.), 464.

APPLIANCES.

See EMINENT DOMAIN.

APPLICATION OF STATUTES.

See CARRIERS OF PASSENGERS; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FIRES SET BY LOCOMOTIVES; LIENS.

APPREHENSION OF DANGER.

See CROSSINGS.

ARMS.

See PERSONAL INJURIES.

ARREST OF PASSENGER.

See CARRIERS OF PASSENGERS.

ASSAULT BY STATION AGENT.

See CARRIERS OF PASSENGERS.

ASSUMPTION OF RISK.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

ATTORNEY AND CLIENT.

See WITNESSES.

AUTOMATIC COUPLER ACTS.

See EMPLOYERS' LIABILITY ACTS.

AVERAGING TESTIMONY.

See EMINENT DOMAIN.

AWAKENING PASSENGERS.

See CARRIERS OF PASSENGERS.

BACKING CARS.

See LICENSEES.

BACKING TRAINS.

See CROSSINGS.

BAGGAGE.

Carrier was liable for loss of, where agent declined to sell through ticket, but sold ticket over his line and connecting line and checked baggage to destination. *Adger v. Blue Ridge Ry. Co. (S. Car.)*, 83.

Delivery to carrier, what did not constitute. *Lennon v. Illinois Cent. R. Co. (Iowa)*, 45.

Initial carrier liable for loss by connecting carrier. *Kansas City Ft. S. & M. R. Co. v. Washington (Ark.)*, 663.

Initial carrier, who sold through ticket, liable for loss on connecting line. *Little Rock & H. S. W. Ry. Co. v. Records (Ark.)*, 664.

Loss of money alone justified refusal to direct verdict, in action based on alleged act of train employee in wrongfully taking passengers satchel, and stealing therefrom her purse. *Southern Pac. Co. v. Maloney (C. C. A.)*, 29.

Negligence, insufficiency of evidence of where baggage unloaded on truck was struck by passing train. *Lennon v. Illinois Central R. Co. (Iowa)*, 45.

Passenger who accepts ticket and baggage check without any knowledge of a condition on back of ticket limiting carrier's liability to its own line is not bound by such condition. *Little Rock & H. S. W. Ry. Co. v. Records (Ark.)*, 664.

What constitutes. *Little Rock & H. S. W. Ry. Co. v. Records (Ark.)*, 664.

BENEFITS.

See EMINENT DOMAIN.

BENEFITS TO OTHER LANDS.

See EMINENT DOMAIN.

BIAS.

See WITNESSES.

BILLS OF LADING.

See CARRIERS OF FREIGHT; CARRIERS OF GOODS; CONNECTING CARRIERS.

Where bill of lading containing carrier's limited liability contract was delivered unsigned by carrier's agent to wife of shipper, who was illiterate, and its contents were not made known to her, it was ineffective as a contract to limit carrier's common-law liability. *Patrick v. Missouri, K. & T. Ry. Co. (Ind. Ter.)*, 554.

BOARDING CAR INSIDE CAR BARN.

See CARRIERS OF PASSENGERS.

BOARDING MOVING CAR.

See CHILDREN.

BOATS.

See RAILROADS.

BRIDGES.

See WATER AND WATERCOURSES.

Railroad liable where private property was especially injured by interruption of navigation of stream for 3 1-2 months by company's drawbridge, broken through negligence in running freight train thereon when draw was closed. *Pharr v. Morgan's L. & T. R. & S. S. Co. (La.)*, 434.

Where the obstruction to navigation by broken railroad drawbridge was such that barges could pass, but steam boats could not, the additional expense of an extra steam boat should be al-

BRIDGES—Continued.

lowed as damages to private property specially injured by such obstruction. *Pharr v. Morgan's L. & T. R. & S. S. Co. (La.)*, 434.

Where usual navigable channel of stream was closed by half span of railroads' drawbridge, broken through company's negligence, and the company drove piling across the other channel for the purpose of repairing the structure and facilitating traffic, the original negligence in breaking the bridge, not the work of reparation, was the primary and paramount cause of the injury. *Pharr v. Morgan's L. & T. R. & S. S. Co. (La.)*, 434.

BURDEN OF PROOF.

See CARRIERS OF GOODS; CONNECTING CARRIERS; ELEVATED RAILWAYS; EMINENT DOMAIN; FIRES SET BY LOCOMOTIVES; STOCK, INJURIES TO.

BUSINESS INTERESTS.

See CARRIERS OF FREIGHT.

BYSTANDERS FAILING TO WARN.

See CROSSINGS.

CAR BARNs.

See CHILDREN.

CAR PLATFORMS.

See CARRIERS OF PASSENGERS.

CARE REQUIRED FOR SELF PROTECTION.

See CHILDREN.

CARRIAGE BY WATER.

See RAILROADS.

CARRIERS.

See BAGGAGE; BILLS OF LADING; CONNECTING CARRIERS; INTERSTATE COMMERCE; RAILROADS; STATIONS AND DEPOTS; WAREHOUSEMEN.

CARRIERS OF FREIGHT.

A carrier, after placing a car load of grain on a spur track to be unloaded, and directing the consignee that it is ready for delivery, is liable for injuries to the consignee's teams and wagon, standing by the car, from being run over by a locomotive from a side track. *Bachant v. Boston & M. R. R. (Mass.)*, 677.

Carriage of fruit, right of carrier to assume that shipper had furnished sufficient ice. *Chicago I. & L. Ry. Co. v. Reyman (Ind.)*, 674.

Carrier bound by acts of its station agent in giving instructions to consignees as to place for unloading freight. *Bachant v. Boston & M. R. R. (Mass.)*, 677.

Damages.

Delay, carrier to be liable for special damages for delay in transportation of freight must have had notice, before or at the time the contract was made, of the special circumstances. It is not enough that it received such notice during the delay. *Crutcher v. Choctaw, O. & G. R. Co. (Ark.)*, 661.

Delay, right to recover special damages depending upon carrier's knowledge of special circumstances. *Crutcher v. Choctaw, O. & G. R. Co. (Ark.)*, 661.

There being a breach of contract for transportation of freight, by

CARRIERS OF FREIGHT—Continued.

delay, the shipper is at least entitled to nominal damages and costs. *Crutcher v. Choctaw, O. & G. R. Co. (Ark.)*, 661.

Discrimination.

As to issuing through bills of lading, or furnishing its cars to connecting carriers, in order that shipments may be carried to ultimate destination without reloading at terminal points, a carrier may discriminate against cotton seed, provided all shippers of that commodity are treated alike. *Central of Georgia Ry. Co. v. Augusta Brokerage Co. (Ga.)*, 634.

Carrier may at any time change its policy as to furnishing shippers of certain commodity privileges which, under the law, it is not bound to extend to them. *Central of Georgia Ry. Co. v. Augusta Brokerage Co. (Ga.)*, 634.

Discrimination, in shipper's favor, in freight charges, in violation of Hurd's Rev. St. 1903, c. 114, sections 114, 125, 126, right of carrier to hold goods for the additional charges. *Illinois Cent. R. Co. v. Seitz (Ill.)*, 684.

Operation of rule 36 of the railroad commission of Georgia is limited to intrastate shipments; and unjust discrimination against shippers engaged in interstate commerce, as to matter of issuing through bills of lading or furnishing reshipping facilities at terminal points within the state, does not constitute a violation of that rule. *Central of Georgia Ry. Co. v. Augusta Brokerage Co. (Ga.)*, 634.

Rule promulgated by railroad commission of Georgia prohibits discrimination, in conduct of intrastate business, against shippers, not against commodities. *Central of Georgia Ry. Co. v. Augusta Brokerage Co. (Ga.)*, 634.

That discrimination against a commodity is dictated by the business interests of the carrier, and really affects but a single shipper, because he is the only one at a terminal point who is engaged in shipping cotton seed out of the state, does not make it illegal. *Central of Georgia Ry. Co. v. Augusta Brokerage Co. (Ga.)*, 634.

Duty to notify consignee of arrival of freight at destination. *Walters v. Detroit United Ry. Co. (Mich.)*, 658.

Evidence.

Competent for plaintiff to show, in action for destruction of cotton by fire that defendant's superintendent in charge of dock habitually became intoxicated and neglected his duties during the time the cotton was being placed on the dock. *Texas & P. Ry. Co. v. Coutourie (C. C. A.)*, 642.

In action against carrier for injuries to consignee's team while unloading, evidence is admissible to show that defendant's customary way of delivering was to place cars on a spur track, and that, while unloading, consignees would have to drive between the spur track and a side track; thus showing the method adopted by plaintiff at the time of the accident was in accordance with defendant's course of business. *Bachant v. Boston & M. R. R. (Mass.)*, 677.

In action against carrier for injury to consignee's team while unloading freight, statements by defendant's station agent, made after the accident, cannot be received as admissions of liability, as they were not made in the performance of his duty. *Bachant v. Boston & M. R. R. (Mass.)*, 677.

Upon the issue as to the negligence of a railroad company in failing to employ a sufficient number of watchmen to guard a large quantity of cotton piled upon its wharf against fire evidence as to the existence at the time of labor disturbances relating to men employed on ships loading at such wharf was competent. *Texas & P. Ry. Co. v. Coutourie (C. C. A.)*, 642.

CARRIERS OF FREIGHT—Continued.

False representations as to character of freight, right of carrier to hold for payment of additional charges. *Illinois Cent. R. Co. v. Seitz* (Ill.), 684.

In an action by shipper against carrier for damage to goods, an omission to file the bill of lading or a copy thereof is ground for demurrer. *Chicago I. & L. Ry. Co. v. Reyman* (Ind.), 674.

Liability of carrier for loss of goods by fire, instructions on proximate and remote cause. *Texas & P. Ry. Co. v. Coutourie* (C. C. A.), 642.

Person receiving from carrier a consignment of grain has a right to rely on the statement of the carrier's station agent that the place where the grain is to be unloaded is safe. *Bachant v. Boston & M. R. R.* (Mass.), 677.

Termination of liability. *Bachant v. Boston & M. R. R.* (Mass.), 677.

Termination of liability after notifying consignee of arrival of goods at destination. *Walters v. Detroit United Ry. Co.* (Mich.), 658.

Termination of liability of carrier as affected by usage of fruit dealers to receive delivery and unload refrigerator cars while they were standing in some convenient place for unloading. *Chicago I. & L. Ry. Co. v. Reyman* (Ind.), 674.

Where a carrier's clerk, who classified goods to be shipped, had seen them as they were being loaded into a car, the carrier could not reclassify the goods, and demand additional freight as a condition precedent to delivery at their destination. *Illinois Cent. R. Co. v. Seitz* (Ill.), 684.

Where fruit is carried by a railroad in a refrigerator car, ice being furnished by the shipper at the commencement of the journey, there is an implication that the carrier will exercise care, if actual delivery should be delayed beyond the usual time, not to permit the fruit to be spoiled by heat. *Chicago I. & L. Ry. Co. v. Reyman* (Ind.), 674.

CARRIERS OF GOODS.

See CARRIERS OF FREIGHT; CONNECTING CARRIERS.

Carrier furnishing defective car liable for injuries although shipper inspected it and knew of defect. *St. Louis, etc., Ry. Co. v. Marshall* (Ark.), 38.

Cars, complaint, in action for failure to supply was demurrable for failure to allege demand on authorized person. *St. Louis, etc., Ry. Co. v. Moss* (Ark.), 66.

Complaint sufficiently definite as to when demands for cars were made, where stations were small, so that carrier might ascertain whether such was the fact. *Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.), 525.

Complaint sufficiently showed tender of freight was to the respective station agents. *Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.), 525.

Damages.

Defendant carrier could not be held liable for special damages from the idleness of cotton gin, caused by loss of shipment of machinery, in absence of evidence either that it had notice of the special circumstances before it received the shipment, or that the initial carrier contracted for through shipment, and had such notice before receiving the shipment. *American Express Co. v. Jennings* (Miss.), 546.

Loss of freight, instruction authorizing jury, in determining rental value of cotton gin, stopped on account of loss of machinery by carrier, to consider time lost by plaintiff in going to inquire about it was erroneous. *American Express Co. v. Jennings* (Miss.), 546.

CARRIERS OF GOODS—Continued.

Shipper had right to keep teams necessary for loading on expense while waiting for carrier's performance of agreement to furnish cars, and on its failure to furnish cars was entitled to recover such expense as special damages. *Choctaw, O. & G. Ry. Co. v. Rolfe (Ark.)*, 525.

Special damages for failure to furnish cars cannot be recovered unless facts leading to such damages were made known to carrier. *Choctaw, O. & G. Ry. Co. v. Rolfe (Ark.)*, 525.

Delay.

Delay in shipping, sufficiency of complaint. *St. Louis, etc., Ry. Co. v. Moss (Ark.)*, 68.

Delivery to Carrier.

Carrier liable for loss, though no bill of lading had been executed. *Pine Bluff & A. R. Ry. Co. v. McKenzie (Ark.)*, 50.

Duty to furnish suitable cars. *St. Louis, etc., Ry. Co. v. Marshall (Ark.)*, 38.

Evidence.

Failure to furnish cars, it appeared from the evidence that statements of persons known as "general manager" and "general traffic manager" were admissible. *Choctaw, O. & G. Ry. Co. v. Rolfe (Ark.)*, 525.

Where, in action against carrier for loss of goods stored, it appeared that when plaintiff called for the goods they could not carry them all, and requested defendant's agent to allow the rest to remain in the warehouse until they could call for them, which was assented to, evidence as to how far plaintiff lived from the depot was inadmissible. *Southern Ry. Co. v. Aldredge & Shelton (Ala.)*, 519.

Failure to furnish cars, complaint sufficiently apprises company of the agents upon whom demands were made. *Choctaw, O. & G. Ry. Co. v. Rolfe (Ark.)*, 525.

In action against carrier for loss of goods stored, instruction that, if jury were not satisfied to a reasonable certainty whether the goods were left with defendant at defendant's risk or at plaintiff's risk, they could not find verdict for plaintiff, was properly refused, as requiring too high a degree of proof. *Southern Ry. Co. v. Aldredge & Shelton (Ala.)*, 519.

Instructions, in action against carrier for loss of goods stored, on burden and degree of proof cured, error in refusing to charge that if jury were reasonably satisfied that defendant kept goods in depot with reasonable care, and that some one stayed in the depot in the day, and kept it locked at night, plaintiff could not recover. *Southern Ry. Co. v. Aldredge & Shelton (Ala.)*, 519.

Limiting Liability.

Fixing measure of damages, validity of stipulation, where absence of express consideration. *St. Louis, etc., Ry. Co. v. Marshall (Ark.)*, 38.

Loss of freight, instruction to find for plaintiff was erroneous, as assuming that shipment belonged to him. *American Express Co. v. Jennings (Miss.)*, 546.

Presumption of negligence where railroad failed to deliver on demand goods which it was liable to keep as a warehouseman for hire, and did not account for such failure. *Southern Ry. Co. v. Aldredge & Shelton (Ala.)*, 519.

Warehouseman, railroad company keeping goods in its depot after termination of the transit is only bound to exercise ordinary care. *Southern Ry. Co. v. Aldredge & Shelton (Ala.)*, 519.

Where a carrier placed its refusal to deliver goods at their destination to the owner on the ground that the additional freight imposed was not paid, it could not justify such refusal on the ground that the bill of lading, designating a third person as consignor

CARRIERS OF GOODS—Continued.

and consignee, had not been assigned to the owner. *Illinois Cent. R. Co. v. Seitz* (Ill.), 684.

Where, in an action against a carrier for loss of goods stored, it appeared that plaintiffs requested defendants' agent to allow a portion of the goods to remain in the warehouse until they could call for them it was error for the court to refuse to charge that the fact that plaintiff lived 27 miles from the depot should not be considered by them for any purpose. *Southern Ry. Co. v. Aldredge & Shelton* (Ala.), 519.

Where, in an action against carrier for loss of goods stored, there was no evidence that A. received the goods from the carrier's agent, but the evidence was clear that the goods never went out of the possession of the carrier's agent, until they were lost, a requested instruction that if defendant received the goods from the carrier's agent, and asked him to allow them to remain until he could send back for them, and when he sent back for them they were not there, such facts did not establish defendant's negligence, was properly refused. *Southern Ry. Co. v. Aldredge & Shelton* (Ala.), 519.

Whether or not there was want of ordinary care on part of railroad in keeping goods in its depot as a warehouseman, was a question for jury, where its agent testified that such depot was safe place and was kept locked, and this was all the evidence on the subject. *Southern Ry. Co. v. Aldredge & Shelton* (Ala.), 519.

CARRIERS OF LIVE STOCK.

See CARRIERS OF FREIGHT; CARRIERS OF PASSENGERS.

Demurrer properly sustained to evidence, in action on contract with agent of two carriers; the contract being composed of a letter and telegrams, in which there was no disclosure for which company the agent was acting. *Walter v. Missouri Pac. Ry. Co.* (Kan.), 681.

Filing claim for loss or damage, instruction as to effect of failure to file properly refused as not warranted by evidence. *Baltimore & O. R. Co. v. Hubbard* (Ohio.), 71.

Limiting Liability.

Fixing value in consideration of lower rate, validity of contract. *Baltimore & O. R. Co. v. Hubbard* (Ohio), 71.

Sufficiency of petition alleging failure to read contract, in action against carrier for injury resulting to live stock transported by it. *Walter v. Missouri Pac. Ry. Co.* (Kan.), 681.

CARRIERS OF PASSENGERS.

See BAGGAGE; CHILDREN; DEATH BY WRONGFUL ACT; INTERSTATE COMMERCE; LICENSEES; STATIONS AND DEPOTS; TICKETS AND FARES.

Alighting at intermediate station, rights of passengers; and liability of carrier for injuries from negligence with respect to station premises. *Abbott v. Oregon R. Co.* (Ore.), 52.

Arrest of passenger, carrier liable for act of baggage master in assisting officer, although latter was not at time actively doing anything in furtherance of carrier's business. *Texas Midland R. R. v. Dean* (Tex.), 596.

Arrest of passenger, carrier not required to make active resistance to officer, or to inquire into his authority. *Texas Midland R. R. v. Dean* (Tex.), 596.

Arrest of passenger, insufficiency of evidence that an employee of carrier instigated arrest. *Texas Midland R. R. v. Dean* (Tex.), 596.

Burden of proof was on carrier, in action for refusal to sell ticket for next train, to show that it gave plaintiff correct information

CARRIERS OF PASSENGERS—Continued.

in time to take next train. *Coleman v. Southern Ry. Co. (N. Car.)*, 32.

Carriers not bound to so restrain the liberty of passengers that they can by no act of their own put themselves into unnecessary danger. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.

Cause of defect was a question for jury where car was derailed while passing over defective switch. *Minahan v. Grand Trunk Western Ry. Co. (C. C. A.)*, 562.

Contributory Negligence.

Alighting from moving car, question for jury. *Birmingham Ry., Light & Power Co. v. Willis (Ala.)*, 523.

Alighting from moving train, effect of conductor's agreement to slacken up enough to allow passenger to alight in safety, where he alighted when train was going too fast without the knowledge or concurrence of conductor. *St. Louis Southwestern Ry. Co. of Texas v. Highnote (Tex.)*, 41.

Alighting from rapidly moving car at night. *Walker v. Georgia Ry. & Electric Co. (Ga.)*, 654.

Assumption of risk of attempting to return to seat from platform by way of running board, while street car is moving rapidly, where passenger was struck by trolley post. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.

Boarding car inside car barn. *Kroeger v. Seattle Electric Co. (Wash.)*, 689.

Boarding moving car, nonsuit properly granted. *Meeks v. Atlantic & B. R. Co. (Ga.)*, 672.

Fact that guard rail which passenger knew was ordinarily kept down along the side of the car nearest the trolley poles, for the protection of passengers, was up, did not relieve him of contributory negligence in being on the running board when struck by trolley pole. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.

Intoxicated passenger falling from platform, question for jury. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.

Leaving car to walk on unlighted station platform merely for exercise. *Abbott v. Oregon R. Co. (Ore.)*, 52.

Passenger in caboose of freight train injured by jolt caused by making coupling, while he had left his seat and was walking to door, could not recover for his injuries, even if the coupling was negligently made, as he was well aware of such dangers. *Shamblin v. New Orleans & N. W. R. Co. (La.)*, 528.

Question for jury, in action for injury to street railway passenger from electric shock. *South Covington & C. St. Ry. Co. v. Smith (Ky.)*, 26.

Standing on running board of street car, no proof required to show that it is more dangerous to do so than to be riding on seat, or even on platform. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.

Struck by trolley post while standing on running board of street car. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.

Though street car stopped at unusual place, passenger had right to assume that it stopped pursuant to signals to let passengers alight, in the absence of knowledge that it stopped for another purpose. *Selby v. Detroit Ry. (Mich.)*, 583.

Where a railroad company accepts an unattended passenger who is so drunk as to be unable to look after himself, and has knowledge of such fact when it accepts him as a passenger, the question of contributory negligence cannot arise when he is injured. *Price v. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.

Damages.

Four thousand dollars was not excessive for injuries to street

CARRIERS OF PASSENGERS—Continued.

car passenger from electric shock. *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 26.

Degree of Care.

Lighting stations and grounds. *Abbott v. Oregon R. Co.* (Ore.), 53.

Degree of care required of carrier to protect intoxicated person, unattended and unable to take care of himself, and accepted by conductor as a passenger. *Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 534.

Degree of care required to prevent street car passengers from being injured by electric shocks, instructions, taken together, were proper. *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 26.

Drover's pass, "bona fide employees" meant persons actually in charge of stock, though they had never been employed by shipper before the occasion in question. *Weaver v. Ann Arbor R. Co.* (Mich.), 603.

Drover's pass, evidence warranted finding that deceased was placed in charge of cattle by shipper. *Weaver v. Ann Arbor R. Co.* (Mich.), 603.

Duty of conductor on single track street railway, before starting car, to look on both sides of car to see if passengers are about to enter. *Redington v. Harrisburg Traction Co.* (Pa.), 600.

Duty to awaken sleeping passenger when destination is reached. *Seaboard Air Line Ry. v. Rainey* (Ga.), 655.

Evidence.

Arrest of passenger on charge imputing want of chastity, error to refuse to permit defendant carrier to ask plaintiff if she had not often before been arrested on similar charges. *Texas Midland R. R. v. Dean* (Tex.), 596.

Arrest of passenger on charge imputing want of chastity, error to refuse to permit defendant carrier to show that at time of arrest plaintiff was keeping house of prostitution. *Texas Midland R. R. v. Dean* (Tex.), 596.

Explosions of dynamite and firearms, liability for injury to passenger caused by wanton acts of other passengers under the influence of liquor. *Nashville, C. & St. L. Ry. Co. v. Flake* (Tenn.), 552.

Fact that trolley pole, by which passenger was struck while on running board, was slightly nearer track than the two other trolley poles on each side of it does not tend to prove that the pole was dangerously near, nor does it show gross negligence; the other poles being further from track than was necessary. *Bridges v. Jackson Elec. Ry., L. & P. Co.* (Miss.), 512.

In action for personal injuries sustained while attempting to enter street car, evidence was sufficient to take case to jury. *Redington v. Harrisburg Traction Co.* (Pa.), 600.

In action for refusal to sell ticket for next train, a subsequent announcement by the ticket agent that such train had arrived was no defense, where it was not brought to plaintiff's knowledge. *Coleman v. Southern Ry. Co.* (N. Car.), 32.

Injury to person on freight train, who did not try to ascertain whether it was intended for passengers, where it was against carriers rules for such train to carry passengers, carrier not liable where collision was due to carelessness, but not to wanton or willful negligence. *St. Louis, I. M. & S. Ry. Co. v. Reed* (Ark.), 541.

In the absence of evidence, it would not be presumed that a trolley pole which was 33 inches from nearest rail of street car track was dangerously near or at all too close to the track, in action for in-

CARRIERS OF PASSENGERS—Continued.

- jury to passenger struck by the pole while on running board. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.
- Intoxicated persons, duty to accept as passengers. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.
- Intoxicated person unable to look after himself and unattended, scope of conductor's authority to accept as a passenger. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.

Limiting Liability.

- Drover's pass, release of liability for negligence causing injury to one riding upon was invalid. *Weaver v. Ann Arbor R. Co. (Mich.)*, 603.
- Mere fact that passenger was struck by trolley pole while on running board did not even tend to prove that the pole was too near track. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.
- Negligence in construction of platform of elevated railway car, insufficiency of evidence. *Willworth v. Boston Elevated Ry. Co. (Mass.)*, 69.
- Negligence in not taking measures to prevent crowding of passengers leaving elevated railway car, insufficiency of evidence of. *Willworth v. Boston Elevated Ry. Co. (Mass.)*, 69.
- Negligence of conductor in permitting drunken passenger to go on platform, from which he fell, was question for jury. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.
- Negligence, question for jury, in action for injury to street car passenger from electric shock. *South Covington & C. St. Ry. Co. v. Smith (Ky.)*, 26.
- Negligence, to ask passengers leaving elevated railway car to move quickly is not. *Willworth v. Boston Elevated Ry. Co. (Mass.)*, 69.
- Passenger injured by sudden jerk, while he was standing with one foot on platform and the other on car step, was not entitled to recover in the absence of evidence as to cause of jerk. *Conroy v. Detroit United Ry. (Mich.)*, 671.
- Passenger purchasing ticket for transportation to station on carrier's line cannot, on boarding train not scheduled to stop at that point, compel conductor to accept ticket, or recover damages for being ejected from train. *Hancock v. Louisville & N. R. Co. (Ky.)*, 612.
- Presumption of negligence, collision between electric car and another vehicle. *Fagan v. Rhode Island Co. (R. I.)*, 22.
- Presumption of negligence, doctrine of *res ipsa loquitur*, when, and when not, applicable where passenger is killed. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.
- Presumption of negligence from injury to passenger by derailment of car passing over switch. *Minahan v. Grand Trunk Western Ry. Co. (C. C. A.)*, 562.
- Presumption of negligence where street car passenger was injured by electric shock. *South Covington & C. St. Ry. Co. v. Smith (Ky.)*, 26.
- Schedule of trains as an offer, which, when accepted by asking for ticket, gives legal right to transportation by next train, under N. Car. Code, § 1963. *Coleman v. Southern Ry. Co. (N. Car.)*, 32.

Separation of White and Colored Passengers.

- Constitutionality of Md. Acts 1904, p. 186, c. 109, requiring separate coaches to be provided for and be occupied by white and colored passengers. *Hart v. State (Md.)*, 622.
- Fact that white passengers were compelled to ride in compartment with colored persons did not render carrier liable for a violation of Ky. St. 1903, § 795. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 91.
- Object of Kirby's Dig., § 6622, requiring separate waiting rooms

CARRIERS OF PASSENGERS—Continued.

to be provided for white and colored passengers, is merely to prevent discrimination, and does not require the same accommodations to be furnished for the two races. *Choctaw, O. & G. R. Co. v. State* (Ark.), 544.

Sufficiency of indictment for violation of Arkansas statute requiring separate waiting rooms to be furnished for white and colored passengers, but forbidding discrimination with respect to accommodations. *Choctaw, O. & G. R. Co. v. State* (Ark.), 544.

Speed in violation of ordinance not negligence with respect to passenger alighting from moving train. *St. Louis Southwestern Ry. Co. of Texas v. Highnote* (Tex.), 41.

Street railway not negligent in failing to maintain guard rail on side of car nearest trolley posts, for protection of passengers, where the posts are not dangerously near track, and the danger therefrom is obvious. *Bridges v. Jackson Elec. Ry., L. & P. Co.* (Miss.), 512.

Where passenger is thrown from step of car while trying to enter it, by starting of car, carrier is liable for his injuries. *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 586.

Where signal to start train if given when every one reasonably to be regarded as a passenger is safely on, there is no negligence as to one stepping on platform just as train starts, who is thrown off and injured. *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 586.

Where street car is stopped under circumstances which justify passenger in believing that he is invited to alight, conductor must not start car while passenger is alighting. *Selby v. Detroit Ry.* (Mich.), 583.

Who Are Passengers.

Alighted passenger entitled to reasonable time to leave station premises; and intending passenger's right to occupy waiting room. *St. Louis Southwestern Ry. Co. of Texas v. Highnote* (Tex.), 41.

Person boarding car inside car barn was not a passenger. *Kroeger v. Seattle Electric Co.* (Wash.), 689.

Person riding upon drover's pass. *Weaver v. Ann Arbor R. Co.* (Mich.), 603.

Person who intended to take train not due for hour or so, and who had purchased no ticket, was not a passenger while writing in office of station room by permission of station agent, where he was assaulted by such agent in an altercation between them over a private matter; and Miss. Code 1892, § 4313, requiring railroad companies to furnish suitable reception rooms and to protect passengers from offensive conduct, had no application. *Andrews v. Yazoo & M. V. R. Co.* (Miss.), 587.

CARS.

See CARRIERS OF GOODS; CONNECTING CARRIERS.

CATTLE.

See CARRIERS OF LIVE STOCK; CONNECTING CARRIERS; STOCK, INJURIES TO.

CATTLE GUARDS.

See STOCK, INJURIES TO.

CHALLENGE OF JURORS.

See EMINENT DOMAIN.

CHANGE OF POLICY.

See CARRIERS OF FREIGHT.

CHARGE OF STOCK.

See CARRIERS OF PASSENGERS.

CHARGES.

See CARRIERS OF FREIGHT.

CHECKS.

See BAGGAGE.

CHILDREN.

See DEATH BY WRONGFUL ACT; NEGLIGENCE; PERSONAL INJURIES; RAILROADS IN STREETS.

Care required of child for his own safety. *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 444.

Care required of child for self protection. *Christensen v. Oregon Short Line R. Co.* (Utah), 121.

Child, of company's tenant who rented tenement adjoining company's car barn, was at most a mere licensee while playing on the roof of the barn, to whom defendant owed no duty except to refrain from wanton injury or from setting a trap for him. *Dalin v. Worcester Consol. St. Ry. Co.* (Mass.), 476.

Contributory Negligence.

Boy about 11 years old was not guilty of negligence per se in attempting to board train of slowly moving street cars. *Chicago Union Traction Co. v. Lundahl* (Ill.), 15.

Damages.

Evidence of father's occupation and earnings admissible on presumption that injured child would follow father's vocation. *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 444.

Degree of care required of those having charge of dangerous explosives, to prevent injury to others, must be commensurate with the dangerous nature of the article, and is greater and more exacting as respects young children. *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 502.

Dynamite, evidence was sufficient to justify jury in finding that it was obtained from defendant's premises, that defendant negligently permitted it to remain thereon exposed and unguarded, and that the children were not guilty of contributory negligence. *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 502.

Evidence.

Evidence that boy had 20 cents was admissible, where the question was whether his companion was passenger or trespasser when killed while attempting to board street car. *Chicago Union Traction Co. v. Lundahl* (Ill.), 15.

Manifestations of pain by child of six. *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 444.

Imputed negligence, in action by child non sui juris for his personal injuries, contributory negligence of his parents will not prevent recovery. *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 502.

Negligence of parent will bar action by him for loss of services of his child non sui juris from latter's personal injuries, but not an action by the infant. *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 502.

Negligence, sufficiency of evidence of, in action for death of boy about 11 years old, killed while attempting to board street car. *Chicago Union Traction Co. v. Lundahl* (Ill.), 15.

Snow fence erected on his father's property, negligence in constructing and fastening was question for jury, in action for injury to child of six by falling of panel. *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 444.

CHILDREN—Continued.

Street railways not liable for death of child caused by its conduct in running suddenly and unexpectedly upon track 5 to 10 feet ahead of a rapidly moving electric car. *Miller v. St. Charles St. R. Co. (La.)*, 460.

Torpedoes left by railroad employees on track or street, railroad was liable where child picked it up and exploded it. *Merschel v. Louisville & N. R. Co. (Ky.)*, 829.

Trespassing child caused to jump or fall from moving car by threatening motions and calls of brakeman, negligence question for jury. *Pollack v. Pennsylvania R. Co. (Pa.)*, 764.

Where child of six was injured by fall of panel of railroad snow fence erected on his father's land by permission, the fact that the child and his younger brother, finding the panel down, had lifted it into position, earlier in the day, was not such an intervening cause as to show, as matter of law, that the negligence of defendant in erecting and fastening the fence was not the proximate cause of the injury. *Fishburn v. Burlington & N. W. Ry. Co. (Iowa)*, 444.

CINDERS.

See FIRES SET BY LOCOMOTIVES.

CIRCUMSTANCES.

See CHILDREN.

CIRCUMSTANTIAL EVIDENCE.

See FIRES SET BY LOCOMOTIVES.

CLAIMS.

See CARRIERS OF LIVE STOCK; STOCK, INJURIES TO.

CLASSIFICATION OF FREIGHT.

See CARRIERS OF FREIGHT.

COLLISIONS.

See CARRIERS OF PASSENGERS; CROSSINGS; MASTER AND SERVANT; STREET RAILWAYS.

COLORED PEOPLE.

See CARRIERS OF PASSENGERS; INTERSTATE COMMERCE.

COMMODITIES.

See CARRIERS OF FREIGHT.

COMMON CARRIERS.

See CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CONNECTING CARRIERS.

COMPARATIVE NEGLIGENCE.

See MASTER AND SERVANT.

COMPLAINTS OF PAIN.

See CHILDREN.

COMPLIANCE WITH POLICE REGULATIONS.

See EMINENT DOMAIN.

COMPROMISE.

See STOCK, INJURIES TO.

CONCLUSIONS OF WITNESSES.

See FIRES SET BY LOCOMOTIVES.

CONCURRING NEGLIGENCE.

See MASTER AND SERVANT.

CONCURRENT NEGLIGENCE.

See FELLOW SERVANTS.

CONDITIONAL SALE OF RAILS.

See STREET RAILWAYS.

CONDITIONAL SALE OF ROLLING STOCK.

See STREET RAILWAYS.

CONGRESS.

See PUBLIC LANDS.

CONNECTING CARRIERS.

See BAGGAGE; CARRIERS OF FREIGHT; STATIONS AND DEPOTS.

Carriers may issue through bills of lading, and make contracts for through shipments, or for interchange of freight between each other. *Graham & Ward v. Macon, D. & S. R. Co. (Ga.)*, 47.

Defective car, carrier furnishing liable although injury occurred beyond its own line. *St. Louis, etc., Ry. Co. v. Marshall (Ark.)*, 38.

Loss of goods on connecting carrier's line, sufficiency of evidence. *Bullock v. Boston & H. Dispatch Co. (Miss.)*, 594.

Presumption that loss of some of goods occurred on line of connecting carrier, where case containing goods were delivered in good order to initial carrier. *Bullock v. Boston & H. Dispatch Co. (Miss.)*, 594.

Selection of route, initial carrier's right to designate not absolute or inalienable. *Steidl v. Minneapolis & St. L. R. Co. (Minn.)*, 668.

Selection of route, right of initial carrier where bill of lading is silent. *Steidl v. Minneapolis & St. L. R. Co. (Minn.)*, 668.

Selection of route, sufficiency of evidence of agreement. *Steidl v. Minneapolis & St. L. R. Co. (Minn.)*, 668.

CONSIDERATION.

See CARRIERS OF GOODS; CARRIERS OF LIVE STOCK.

CONSIGNEE'S TEAM.

See CARRIERS OF FREIGHT.

CONSTITUTIONAL LAW.

See CARRIERS OF PASSENGERS; INTERSTATE COMMERCE; STREET RAILWAYS.

Granting to a municipal corporation of power to pass all necessary ordinances for the protection of the safety of citizens is not an infringement of the maxim that legislative power may not be delegated. *Sluder v. St. Louis Transit Co. (Mo.)*, 293.

CONSTRUCTION WORK.

See STOCK, INJURIES TO; WATER AND WATER-COURSES.

CONTRACTORS.

See MASTER AND SERVANT.

CONTRACTS.

See BILLS OF LADING; CARRIERS OF LIVE STOCK; RAILROADS.

CONTRACTS FOR THROUGH SHIPMENTS.

See CONNECTING CARRIERS.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; DEATH BY WRONGFUL ACT; IMPUTED NEGLIGENCE; LOGGING RAILROADS; NEGLIGENCE; RAILROADS IN STREETS; STOCK, INJURIES TO; STREET RAILWAYS.

Complaint need not negative. *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.)*, 207.

Intoxication. *Stewart v. North Carolina R. Co. (N. Car.)*, 212.

Must be pleaded although denied in complaint. *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.)*, 207.

Must be specially pleaded. *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.)*, 207.

Question for injury when evidence is conflicting. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.

Refusal to give special instruction on question will not be reviewed, where court held as matter of law that decedent was guilty of contributory negligence. *Stewart v. North Carolina R. Co. (N. Car.)*, 212.

When is it the duty of the court to instruct that it will prevent recovery, where defendant produces no proof to support plea. *Bridges v. Jackson Elec. Ry., L. & P. Co. (Miss.)*, 512.

When question for jury in action for personal injuries. *McLean v. Omaha & C. B. Ry. & Bridge Co. (Neb.)*, 119.

CORPORATIONS.

See EVIDENCE; RAILROADS; WAREHOUSEMEN.

COTTON GINS.

See CARRIERS OF GOODS.

COTTON SEED.

See CARRIERS OF FREIGHT.

CREDIBILITY OF TESTIMONY.

See CROSSINGS.

CRIMINAL LAW.

See CARRIERS OF PASSENGERS.

CROSS EXAMINATION.

See EMINENT DOMAIN.

CROSS PETITION.

See EMINENT DOMAIN.

CROSSING OVER TRAINS.

See CROSSINGS.

CROSSINGS.

See DEATH BY WRONGFUL ACT; EMINENT DOMAIN; STOCK, INJURIES TO.

Contributory Negligence.

Cannot be based on mere failure to hear approaching train, where person stopped and listened. *Birmingham Southern Ry. Co. v. Lintner* (Ala.), 225.

Crossing relying on assurance of bystander, where view was obstructed, but engine was heard puffing. *Coffee v. Pere Marquette R. Co.* (Mich.), 772.

Failure to look, or attempting to cross with knowledge of approach of locomotive. *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 846.

In action for injuries sustained by plaintiff, owing to starting of train while he was attempting to cross by getting upon the bumpers between cars, in reliance on statement of brakeman that there was plenty of time, question of contributory negligence was for jury. *Sheridan v. Baltimore & O. R. Co.* (Md.), 766.

Intoxication, instruction that if deceased could not realize his danger he was not guilty of contributory negligence, was properly refused. *Stewart v. North Carolina R. Co.* (N. Car.), 212.

Loss of self control of driver of vehicle, who, while rightfully on track, saw train 125 feet away approaching at unlawful speed and without signals. *Morey v. Lake Superior Terminal & Transfer Ry. Co.* (Wis.), 113.

Of boy of 16 was for jury, where his view of train was obstructed by smoke from another train, which had passed, and the train by which he was struck was violating speed ordinance. *Farrell v. Erie R. Co.* (C. C. A.), 485.

Person approaching crossing in city not bound to anticipate that train will approach at an unlawful or unusual speed. *Farrell v. Erie R. Co.* (C. C. A.), 485.

Person approaching crossing is bound to give way to a train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety. *Southern Ry. Co. v. Carroll* (C. C. A.), 488.

Private crossing, question for jury. *Wilson's Adm'rs v. Chesapeake & O. Ry. Co.* (Ky.), 103.

Question for jury. *Christensen v. Oregon Short Line R. Co.* (Utah), 121.

Sitting or lying on track in an intoxicated condition. *Stewart v. North Carolina R. Co.* (N. Car.), 212.

Damages.

Railroad entitled to no compensation for constructing and maintaining highway crossing, but entitled to compensation for the establishment of the highway across its right of way, under Arkansas Statute. *St. Louis Southwestern Ry. Co. v. Royall* (Ark.), 309.

Error for court to assume, in attempting to show by mechanical calculations, the contributory negligence of deceased, that the train was moving at a speed of 40 miles per hour, and deceased's wagon at a speed of 2 miles per hour, where the evidence was conflicting. *Schwarz v. Delaware, L. & W. R. Co.* (Pa.), 441.

Flagmen.

Evidence of absence of was admissible, though such negligence was not charged in complaint. *Christensen v. Oregon Short Line R. Co.* (Utah), 121.

Failure to maintain at highway crossing was not negligence. *Christensen v. Oregon Short Line R. Co.* (Utah), 121.

CROSSINGS—Continued.**Gates.**

Evidence of absence of was admissible, though such negligence was not charged in complaint. *Christensen v. Oregon Short Line R. Co. (Utah)*, 121.

Failure to maintain at highway crossings not negligence. *Christensen v. Oregon Short Line R. Co. (Utah)*, 121.

Where they have been erected at dangerous crossing, speed of trains must be slackened when watchman is off duty and gates open. *Schwarz v. Delaware, L. & W. R. Co. (Pa.)*, 441.

Kicking cars without warning over crossing of street is actionable negligence, with respect to pedestrian run over by such cars. *Chicago Terminal Transfer R. Co. v. Walton (Ind.)*, 456.

Negligence and contributory negligence, questions for jury. *Northern Cent. Ry. Co. v. State (Md.)*, 818.

Negligence in backing train in town without lights or signals. *St. Louis, I. M. & S. Ry. Co. v. Johnson (Ark.)*, 775.

Negligence of trainmen in failing to see highway traveler and negligence of latter in not seeing train, no right to recover. *Woolf v. Washington Ry. & Nav. Co. (Wash.)*, 846.

Negligence, question for jury. *Christensen v. Oregon Short Line R. Co. (Utah)*, 121.

Person about to cross railroad track is bound not only to look and listen, but to continue to use his eyes and ears until he has completed the crossing and passed out of danger. *St. Louis, I. M. & S. Ry. Co. v. Johnson (Ark.)*, 775.

Private crossing, negligence in causing collision is a question for jury. *Wilson's Adm'rs v. Chesapeake & O. Ry. Co. (Ky.)*, 103.

Proximate cause of accident, question for jury. *Christensen v. Oregon Short Line R. Co. (Utah)*, 121.

Questions as to respective speed of train and deceased's wagon were for jury. *Schwarz v. Delaware, L. & W. R. Co. (Pa.)*, 441.

Right of trainmen to assume that highway traveler will avoid danger. *Woolf v. Washington Ry. & Nav. Co. (Wash.)*, 846.

Signals.

Burden of proving compliance with Alabama Code 1896, § 3443. *Birmingham Southern Ry. Co. v. Lintner (Ala.)*, 225.

Evidence as to extent of use of highway by public was admissible, where plaintiff claimed that signals were not given by train which killed his son. *Christensen v. Oregon Short Line R. Co. (Utah)*, 121.

Evidence as to number of crossings within half a mile of place of accident was properly excluded; the duty to deceased in regard to giving signals only extending to the crossing where he was killed. *Stewart v. North Carolina R. Co. (N. Car.)*, 212.

Negative and affirmative testimony, comparative weight. *Northern Cent. Ry. Co. v. State (Md.)*, 818.

Negative testimony must not be disregarded by jury. *Northern Cent. Ry. Co. v. State (Md.)*, 818.

Overhead crossings. *Louisville & N. R. Co. v. Sawyer (Tenn.)*, 800.

Private crossings, failure to give signals at not negligence as to persons using them. *Wilson's Adm'rs v. Chesapeake & O. Ry. Co. (Ky.)*, 103.

Private crossings, whether negligence to fail to give signals at depends upon the circumstances of the case. *Ayers v. Wabash R. Co. (Mo.)*, 470.

Whether statutory signals were given was for jury; the evidence being conflicting. *Southern Ry. Co. v. Carroll (C. C. A.)*, 488.

Speed.

Of trains must be regulated according to degree that view of trains by highway traveler is obstructed. *Schwarz v. Delaware, L. & W. R. Co. (Pa.)*, 441.

CROSSINGS—Continued.**Stop, Look, and Listen.**

Contributory negligence of person struck by train backing without light or signals was question for jury. *St. Louis, I. M. & S. Ry. Co. v. Johnson* (Ark.), 775.

Failure to look and listen not necessarily negligence. *Wilson's Adm'rs v. Chesapeake & O. Ry. Co.* (Ky.), 103.

Recovery prevented where driver of vehicle could have seen train while 68 feet from track, although he testified that he looked and listened. *Marshall v. Green Bay & W. R. Co.* (Wis.), 138.

Street railway crossings. *Los Angeles Traction Co. v. Conneally* (C. C. A.), 107.

Where bystanders, in position to see train approaching, failed to warn traveler, he was not guilty of contributory negligence, as matter of law, in failing to ask such persons whether it was safe to cross the track. *Coffee v. Pere Marquette R. Co.* (Mich.), 772.

Where plaintiff's view was entirely obstructed, and he stopped 30 feet from track, until satisfied that it was safe to proceed, he was not guilty of contributory negligence, as a matter of law, in not stopping again, in addition to continuously listening, before driving on track. *Coffee v. Pere Marquette R. Co.* (Mich.), 772.

Willful contributory negligence precluding recovery, within statute declaring that, if a person is injured by collision with a train at a crossing, and it appears that the railroad neglected to give statutory signals, which contributed to the injury, it shall be liable for damages, unless the person injured was guilty of gross or willful negligence which contributed to the injury. *Southern Ry. Co. v. Carroll* (C. C. A.), 488.

Under Ala. Code, 1896, § 3441, requiring trains to stop at railroad crossings, and section 3443, making railroads liable for all damages resulting from failure to comply with any of the three preceding sections, failure of railroad to stop train at crossing, whereby train on intersecting track is struck and overturned, so as to kill person walking by side of such track, is negligence as to such person. *Southern Ry. Co. v. Williams* (Ala.), 429.

CROSSINGS OF RAILROADS.

See STREET RAILWAYS.

CROWDING.

See CARRIERS OF PASSENGERS.

CULVERTS.

See MASTER AND SERVANT.

CUSTOM AND USAGE.

See CARRIERS OF FREIGHT.

DAMAGES.

See BRIDGES; CARRIERS OF PASSENGERS; CROSSINGS; INJURIES TO PROPERTY; PERSONAL INJURIES; RAILROADS; STOCK, INJURIES TO; WATER AND WATERCOURSES.

Punitive Damages.

Where plaintiff sues for punitive damages for a particular wrongful act, and relies, as evidencing the animus with which that act was committed, upon the commission of a wholly independent act, done at a different time and place, defendant should be advised by plaintiff's pleading of the case he is expected to meet. *Central of Georgia Ry. Co. v. Augusta Brokerage Co.* (Ga.), 634.

DANGER FROM TRAINS.

See EMINENT DOMAIN.

DEATH BY WRONGFUL ACT.

See EMPLOYERS' LIABILITY ACTS; STATIONS AND DEPOTS.

County of plaintiff's residence, in action for death under Kentucky statutes against a carrier, is the county in which deceased's personal representative lives. *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 729.

Damages.

Presumption that deceased son would have returned home, or turned his wages, or a portion thereof, over to his parents, not warranted by the evidence. *Dean v. Oregon R. & Nav. Co.* (Wash.), 237.

Evidence.

Admission of killing by defendant, portion of paragraph of answer admissible without remaining portion. *Gorham Mfg. Co. v. New York, etc., R. Co.* (R. I.), 216.

Error in excluding evidence as to killing was harmless where issue, "did defendant negligently kill plaintiff's decedent?" was answered in the affirmative. *Stewart v. North Carolina R. Co.* (N. Car.), 212.

Missouri statute, providing that defendants, including carriers of passengers, shall forfeit \$5,000 for wrongfully causing a death, is penal, and not enforceable in Illinois. *Raisor v. Chicago & A. R. Co.* (Ill.), 96.

Presumption of due care on part of deceased, contributory negligence in attempting to drive over street crossing in front of approaching car rendered instruction as to erroneous. *Los Angeles Traction Co. v. Conneally* (C. C. A.), 107.

Presumption of due care on part of deceased, instruction properly modified in favor of defendant. *Stewart v. North Carolina R. Co.* (N. Car.), 212.

Presumption of due care on part of deceased not warranted by circumstances. *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 846.

Right of action, under section 746, Rev. Code Civ. Proc. S. D., giving widow right of action for death caused by tort of servant of railroad, cause of action must come strictly within terms of statute. *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 269.

St. Mo. p. 1043, c. 70, § 2, authorizing recovery without proof of pecuniary loss, is rendered against public policy by certain Illinois Statute. *Raisor v. Chicago & A. R. Co.* (Ill.), 96.

DEDICATION.

See STREET RAILWAYS.

DEDUCTIONS.

See EMINENT DOMAIN.

DEFECTS.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; FELLOW SERVANTS; MASTER AND SERVANT.

DEFENSES.

See EMINENT DOMAIN.

DEFINITIONS.

See NEGLIGENCE.

DEGREE OF PROOF.

See CARRIERS OF GOODS.

DEGREE OF CARE.

See CARRIERS OF PASSENGERS; CHILDREN; LICENSEES; LOGGING RAILROADS; MASTER AND SERVANT; NEGLIGENCE; STOCK, INJURIES TO.

DELAY.

See CARRIERS OF FREIGHT; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; TICKETS AND FARES.

DELEGATION OF POWERS.

See CONSTITUTIONAL LAW.

DELIVERY TO CARRIER.

See BAGGAGE; CARRIERS OF GOODS.

DEPOTS.

See STATIONS AND DEPOTS.

DERAILING SWITCHES.

See MASTER AND SERVANT.

DERAILMENT.

See CARRIERS OF PASSENGERS.

DESIGNATING OWNER OF LAND.

See EMINENT DOMAIN.

DISCRETION OF COURT.

See WITNESSES.

DISCRIMINATION.

See CARRIERS OF FREIGHT.

DISCRIMINATION AFFECTING ONLY ONE SHIPPER.

See CARRIERS OF FREIGHT.

DISCRIMINATION AGAINST COMMODITIES.

See CARRIERS OF FREIGHT.

DISCRIMINATION AGAINST RAILROADS.

See EMINENT DOMAIN.

DISCRIMINATION BETWEEN WHITE AND COLORED PASSENGERS.

See CARRIERS OF PASSENGERS.

DISCRIMINATION IN CHARGES.

See CARRIERS OF FREIGHT.

DISCOVERED PERIL.

See STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

DISCOVERY OF PLAINTIFF'S PERIL.

See NEGLIGENCE.

DISTINCTIONS BETWEEN LIABILITIES OF DIFFERENT CLASSES OF MASTERS.

See STATIONS AND DEPOTS.

DOUBLE DAMAGES.

See STOCK, INJURIES TO.

DRAWBRIDGES.

See BRIDGES.

DRIVERS.

See IMPUTED NEGLIGENCE.

DRIVER'S NEGLIGENCE.

See STREET RAILWAYS.

DRIVING ON LEFT-HAND SIDE OF STREET.

See STREET RAILWAYS.

DROVER'S PASS.

See CARRIERS OF PASSENGERS.

DRUNKENNESS.

See ACCIDENTS ON-TRACK; CARRIERS OF FREIGHT;
CARRIERS OF PASSENGERS; CROSSINGS.

DUTY TO PREVENT PASSENGERS FROM EXPOSING THEMSELVES TO DANGER.

See CARRIERS OF PASSENGERS.

DUTY TO RESTRAIN PASSENGERS.

See CARRIERS OF PASSENGERS.

DYNAMITE.

See CHILDREN; NEGLIGENCE.

EARNINGS.

See PERSONAL INJURIES.

EJECTION.

See TRESPASSERS.

ELECTRIC SHOCKS.

See CARRIERS OF PASSENGERS.

ELEVATED RAILWAYS.

See CARRIERS OF PASSENGERS.

Burden of proving, in action for personal injuries, that the snow fell from defendant's railway tracks. *McGee v. Boston Elevated Ry. Co. (Mass.)*, 864.

In action for personal injuries received while passing along street by elevated railway tracks, evidence did not show that the snow came from such tracks. *McGee v. Boston Elevated Ry. Co. (Mass.)*, 864.

ELEVATORS.

See RAILROADS.

EMINENT DOMAIN.

Amount awarded to landowners by commissioner's report to be treated as prima facie correct. *Richmond & P. Electric Ry. Co. v. Seaboard Air Line Ry. (Va.)*, 354.

Company could not complain, because of a provision of its charter, that the court instructed that the property owners had the right to have their damages estimated with reference to any motive power that the company might use under its charter. *Chicago & M. Electric R. Co. v. Diver (Ill.)*, 346.

Compensation and incidental benefits, respective application of constitutional and statutory provision. *Wray v. Knoxville, L. F. & J. R. Co. (Tenn.)*, 329.

EMINENT DOMAIN—Continued.

Condemnation of stock in another railroad, that company has charter power to do all that it proposes by means as advantageous to the public as by the acquisition of such stock, is no defense to an application by the railroad to condemn such stock. *New York N. H. & H. R. Co. v. Offield* (Conn.), 312.

Cross petition must allege that petitioner is owner of property alleged to be damaged. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Damages.

As benefits from building of railroad, etc., could not be deducted from direct damages sustained by the taking of the land, the charge on the measure of damages was proper. *Chicago, St. L. & N. O. R. Co. v. Rottgering* (Ky.), 340.

Damages recoverable where highway is opened across railroad right of way. *Village of Plymouth v. Pere Marquette R. Co.* (Mich.), 707.

Danger of loss by fires from negligence with respect to appliances on locomotives not to be considered. *Illinois, I. & M. Ry. Co. v. Freeman* (Ill.), 360.

Danger to persons from trains when crossing track too remote. *Illinois, I. & M. Ry. Co. v. Freeman* (Ill.), 360.

Excessive verdict, evidence insufficient to show that amount of damages indicated passion and prejudice on part of jury. *Chicago, St. L. & N. O. R. Co. v. Rottgering* (Ky.), 340.

Expense of complying with police regulations requiring the opening of trains at crossings to admit teams not recoverable where highway is opened across railroad right of way. *Village of Plymouth v. Pere Marquette R. Co.* (Mich.), 707.

Fact that land was available for public park, and that owners intended to improve it for that purpose, and use it in connection with an electric railway, was too speculative and remote to be considered as an element of damages. *Richmond & P. Electric Ry. Co. v. Seaboard Air Line Ry.* (Va.), 354.

Frontage on another railroad, destruction of as an element of damages. *Wray v. Knoxville, L. F. & J. R. Co.* (Tenn.), 329.

Instruction that jury must not consider benefits to lands not taken when estimating value of land taken was not prejudicial because of other instructions given. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Keeping open right of way until required by law to fence. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Market value, how determined. *Guyandotte Valley Ry. Co. v. Buskirk* (W. Va.), 317.

Market value, instruction as to was not erroneous, for not confining the jury to the "fair cash market value" because of other instructions given. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Market value where entire lot is taken. *Guyandotte Valley Ry. Co. v. Buskirk* (W. Va.), 317.

Measure of damages to land not taken. *Illinois, I. & M. Ry. Co. v. Easterbrook* (Ill.), 337.

Measure of damages where entire lot is taken. *Guyandotte Valley Ry. Co. v. Buskirk* (W. Va.), 317.

Purposes for which land is adapted immaterial, unless such purposes affect its present cash value. *Illinois, I. & M. Ry. Co. v. Freeman* (Ill.), 360.

Valuation of property, whether or not there must be separation of easement and fee. *Southern Pac. R. Co. v. San Francisco Sav. Union* (Cal.), 709.

Valuation of property, whether there must be separation of easement and fee where railroad seeks to condemn oil lands for

EMINENT DOMAIN—Continued.

right of way. *Southern Pac. R. Co. v. San Francisco Sav. Union (Cal.)*, 709.

Value of land for purpose for which, as shown by the evidence, it is most available to be considered. *Chicago & M. Electric R. Co. v. Diver (Ill.)*, 346.

Discrimination against railroad, instruction properly refused as misleading. *Illinois, I. & M. Ry. Co. v. Freeman (Ill.)*, 360.

Erroneous instruction as to the measure of damages to land not taken not cured by other instructions limiting the recovery to the difference in value of the land not taken before and after the construction of the railroad. *Illinois, I. & M. Ry. Co. v. Easterbrook (Ill.)*, 337.

Evidence.

Admissibility of expert testimony on question of market value of oil-bearing territory. *Southern Pac. R. Co. v. San Francisco Sav. Union (Cal.)*, 709.

Evidence that other land, situated similarly to that of defendant not taken, had been benefited by a railroad crossing it in the same way that petitioner proposed to extend its line across the land in question was properly excluded. *Illinois, I. & M. Ry. Co. v. Freeman (Ill.)*, 360.

In proceedings to condemn a right of way over oil-bearing lands it is permissible to show, on the issue of value, a progressive decrease in the productiveness of the field within which the land in question is situated. *Southern Pac. R. Co. v. San Francisco Sav. Union (Cal.)*, 709.

In proceeding to condemn land, under Shannon's Code, § 1857, the opinion of witnesses on the question of incidental damages and benefits to the property that do not attach to other property by the construction of the road is admissible. *Wray v. Knoxville, L. F. & J. R. Co. (Tenn.)*, 320.

Jury should not average testimony of witnesses on question of land damages and values. *Illinois, I. & M. Ry. Co. v. Freeman (Ill.)*, 360.

Opinion evidence as to value of land, admissibility. *Guyandotte Valley Ry. Co. v. Buskirk (W. Va.)*, 317.

Petitioner, where a witness had stated the elements of damages to land not taken, should have been permitted to introduce evidence in reference to the damages that would be sustained by the land on one side of the highway separately from that on the other side. *Illinois, I. & M. Ry. Co. v. Freeman (Ill.)*, 360.

Price at which other land sold. *Chicago, St. L. & N. O. R. Co. v. Rottgering (Ky.)*, 340.

Price paid for the land by defendant as evidence of its value. *Guyandotte Valley Ry. Co. v. Buskirk (W. Va.)*, 317.

Where witness had stated the elements of damages to land not taken, as a basis for the opinion he had expressed, it was proper to exclude a cross question asking him why he stated that the damage was \$50 an acre, rather than \$40, \$60, or \$75. *Illinois, I. & M. Ry. Co. v. Freeman (Ill.)*, 360.

Improper to call jury's attention to the fact that the land was being taken against the will of the owners. *Illinois, I. & M. Ry. Co. v. Easterbrook (Ill.)*, 337.

Instruction objectionable as assuming that there was damage to land not taken. *Illinois, I. & M. Ry. Co. v. Easterbrook (Ill.)*, 337.

Judicial notice cannot be taken that the rights of way of railroad companies are fenced as the track is constructed. *Chicago & M. Electric R. Co. v. Diver (Ill.)*, 346.

Judicial notice will be taken that land is never assessed for taxation at its real cash market value. *Wray v. Knoxville, L. F. & J. R. Co. (Tenn.)*, 320.

EMINENT DOMAIN—Continued.

Jurors, right to challenge, under Illinois statute, as affected by fact that each of several persons has an undivided interest in the land. *Illinois, I. & M. Ry. Co. v. Freeman* (Ill.), 360.

Minerals and oils, railroad acquires no title to by condemning land for right of way. *Southern Pac. R. Co. v. San Francisco Sav. Union* (Cal.), 709.

Ownership of land an issue to be determined before jury is impaneled to assess damages. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Petition must name true owner of land, and he is not required to prove title. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Sufficiency of evidence to warrant the damages awarded. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Under certain sections of West Virginia Code of 1887, alleged owners of land sought to be condemned for railroad right of way were not entitled to have proceedings stayed pending suit in equity between such alleged owners involving title to the land. *Richmond & P. Electric Ry. Co. v. Seaboard Air Line Ry.* (Va.), 354.

Where both litigants proceeded in charging the jury on the theory that damages to lands not taken had been established by the evidence, neither could complain of instructions which assumed that such damages were to be assessed. *Chicago & M. Electric R. Co. v. Diver* (Ill.), 346.

Where, in condemnation proceedings, the only questions of fact were tried by the jury, and such questions were raised by exceptions filed by defendants to the report of the commissioners, the burden of proof was on defendants. *Chicago, St. L. & N. O. R. Co. v. Rottgering* (Ky.), 340.

EMISSION OF SPARKS.

See FIRES SET BY LOCOMOTIVES.

EMPLOYEES.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT; STATIONS AND DEPOTS.

EMPLOYERS' LIABILITY ACTS.

See DEATH BY WRONGFUL ACT.

Federal automatic coupler act has no bearing in an action for injuries to a fireman by a collision in a railroad yard, where there was no proof that the engine and cars in collision were used in interstate commerce. *Rosney v. Erie R. Co.* (C. C. A.), 751.

Freight car being taken to shop for repairs was not within Mass. Rev. Laws, c. 111, §§ 203, 209, prohibiting railroad, "in moving traffic," from hauling car not equipped with automatic coupler. *Taylor v. Boston & M. R. R.* (Mass.), 397.

Under section 746, Rev. Code Civ. Proc. S. D., giving widow right of action for death of husband caused by tort of employee, the tort must have been committed within scope of employment. *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 269.

ENGINE WIPERS.

See FELLOW SERVANTS.

ENGINES.

See FIRES SET BY LOCOMOTIVES.

EVIDENCE.

See ACCIDENTS ON TRACK; CARRIERS OF FREIGHT; CARRIERS OF PASSENGERS; CHILDREN; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; FIRES SET BY

EVIDENCE—Continued.

LOCOMOTIVES; INJURIES TO PROPERTY; STOCK, INJURIES TO; STREET RAILWAYS; WATER AND WATERCOURSES; WITNESSES.

President of railroad may testify to the intention and policy of his company to make certain improvements; and it is unnecessary to show a recorded vote of the directors, authorizing the improvements. *New York, N. H. & H. R. Co. v. Offield* (Conn.), 312.

Speed of train, witnesses who notice that it is unusually fast on approaching depot are not discredited by fact that they are not familiar with management of trains under way. *Harvey v. Louisiana Western R. Co.* (La.), 573.

EXCESSIVE VERDICT.

See CARRIERS OF PASSENGERS; EMINENT DOMAIN; INJURIES TO PROPERTY; PERSONAL INJURIES.

EXCLUSIVE PRIVILEGES.

See STATIONS AND DEPOTS.

EXEMPTION FROM LIABILITY.

See CARRIERS; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; WAREHOUSEMEN.

EXERCISE.

See CARRIERS OF PASSENGERS.

EXITS.

See STATIONS AND DEPOTS.

EXPENSE OF WAITING TEAMS.

See CARRIERS OF GOODS.

EXPENSES.

See PERSONAL INJURIES.

EXPERT TESTIMONY.

See FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.

EXPRESS AGENTS.

See MASTER AND SERVANT; STATIONS AND DEPOTS.

EXPRESS COMPANIES.

See STATIONS AND DEPOTS.

EXTENSIONS OF RAILROADS.

See FIRES SET BY LOCOMOTIVES.

EXTENT OF USE.

See CROSSINGS.

EXPLOSIONS.

See CARRIERS OF PASSENGERS.

EXPLOSIVES.

See CHILDREN; NEGLIGENCE.

EXPOSURE TO DANGER.

See CARRIERS OF PASSENGERS.

FAILURE TO DELIVER.

See CARRIERS OF GOODS.

FAILURE TO FURNISH CARS.

See CARRIERS OF GOODS.

FAILURE TO HEAR TRAIN.

See CROSSINGS.

FAILURE TO OBJECT.

See DEATH BY WRONGFUL ACT.

FAILURE TO READ CONTRACT.

See CARRIERS OF LIVE STOCK.

FALSE REPRESENTATION AS TO CHARACTER OF GOODS.

See CARRIERS OF FREIGHT.

FATHER'S VOCATION.

See CHILDREN.

FEAR.

See CROSSINGS.

FEDERAL COURTS.

See INTERSTATE COMMERCE.

FELLOW SERVANTS.

See MASTER AND SERVANT.

Brakeman engaged with train crew in switching to make up a train, who had switching list, was vice principal of members of the crew, who acted solely in response to his signals. *Struble v. Burlington, C. R. & N. Ry. Co. (Iowa)*, 259.

Concurrent negligence of master and fellow servant, master's liability depending on proximate cause. *Gila Valley, G. & N. Ry. Co. v. Lyon (Ariz.)*, 745.

Employees of company engaged in operating either of two colliding trains were fellow servants of a fireman on one of the trains. *Rosney v. Erie R. Co. (C. C. A.)*, 751.

Engine wiper working in roundhouse was not fellow servant of employee who rendered former's work place unsafe by running another engine against the one on which he was working; such negligence being the negligence of the master. *Mullin v. Northern Pac. Ry. Co. (Wash.)*, 234.

Master liable for injury to flagman struck by train, caused by negligent replacement of his watch box by his fellow servant. *Philadelphia, B. & W. R. Co. v. Devers (Md.)*, 366.

Master not liable for injury to employee unless it resulted from the gross negligence of superior servant. *Illinois Cent. R. Co. v. Elliott (Ky.)*, 145.

Superior servant not fellow servant of employee injured while working under his orders, although the superior was subject to the orders of another while engaged in the work. *Illinois Cent. R. Co. v. Elliott (Ky.)*, 145.

Train dispatcher vice principal of engineer of train running under his orders. *Santa Fe Pac. R. Co. v. Holmes (C. C. A.)*, 248.

Where railroad employed in its repair shop a requisite number of servants who were skillful in doing certain work, but the foreman of the shop negligently detailed on such work an unskilled servant, whose lack of skill caused an injury to another servant, the master was not liable. *Hilton v. Fitchburg R. R. (N. H.)*, 757.

FENCES.

See EMINENT DOMAIN; LICENSEES; STOCK, INJURIES TO.

FILING CLAIMS.

See CARRIERS OF LIVE STOCK.

FIREARMS.

See CARRIERS OF PASSENGERS; NEGLIGENCE.

FIRES.

See CARRIERS OF FREIGHT.

FIRES SET BY LOCOMOTIVES.

See WAREHOUSEMEN.

Care required in providing appliances to prevent escape of sparks from locomotives. *St. Louis, I. M. & S. Ry. Co. v. Coombs (Ark.)*, 480.

Damages.

Instruction that the element of danger by fire and increased cost of insurance on buildings should be considered was applicable to the proof of damages to the other property owners, and was not prejudicial as to D because of the fact that there was no building on her premises, where the jury viewed D's premises. *Chicago & M. Electric R. Co. v. Diver (Ill.)*, 346.

Value of farm before and after fire. *Toledo, St. L. & W. R. Co. v. Fenstermaker (Ind.)*, 855.

Evidence.

Cinders found, the day before the fire, on roof of burned building. *Gorham Mfg. Co. v. New York, etc., R. Co. (R. I.)*, 216.

Expert may be asked if there is any way in which fire coming from the fire box could get above the netting in front end of engine without going through the netting, though the question calls for a conclusion. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

Sparks thrown by the engine compared with quantity thrown by other engines. *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.)*, 207.

Testimony of qualified witness describing character of engines which might have set the fire as belonging to a certain class, and the quality and equipments of such engines with regard to safety and the setting out of fire, and that they were, as a class, the best engines defendant had, and that the features of a locomotive to be considered in connection with the setting out of fire were the nettings, diaphragm, and plates, was relevant and material. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

That engine could not be operated without small cinders escaping from smokestack was admissible. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

Train sheet, as evidence of fact that train reached station on the day in question, was not objectionable as hearsay. *Fireman's Ins. Co. v. Seaboard Air Line Ry. (N. Car.)*, 808.

Instruction requiring the use of "appropriate appliances" was not objectionable, as such term applied to the best appliances previously referred to in another instruction. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

Instruction was not objectionable as eliminating defendant's duty to keep engine in repair. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

Jury need not accept as conclusive the statement of witnesses that the engine was in good order and carefully operated, though they were not contradicted. *St. Louis, I. M. & S. Ry. Co. v. Coombs (Ark.)*, 480.

FIRES SET BY LOCOMOTIVES—Continued.

Origin of fire established by circumstantial evidence. *Toledo, St. L. & W. R. Co. v. Fenstermaker (Ind.)*, 855.

Plaintiff was not prejudiced, because of instructions given on the presumption of negligence and burden of proof, by an instruction that even though defendant's engine set out the fire, there could be no recovery unless the jury further found that the sparks escaped through some negligence of defendant, either in failing to keep the locomotive "in good repair" or otherwise. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

Presumption of negligence. *St. Louis, I. M. & S. Ry. Co. v. Coombs (Ark.)*, 480.

Presumption of negligence from origin of fire. *Fireman's Ins. Co. v. Seaboard Air Line Ry. (N. Car.)*, 808.

Presumption of negligence, instruction properly refused because of instruction given. *Fireman's Ins. Co. v. Seaboard Air Line Ry. (N. Car.)*, 808.

Prima facie case made for plaintiff by evidence of origin of fire. *St. Louis, I. M. & S. Ry. Co. v. Coombs (Ark.)*, 480.

Rhode Island statute making New York, P. & B. R. Co. liable for all damages from fires set by its engines held applicable to an extension of its line. *Gorham Mfg. Co. v. New York, etc., R. Co. (R. I.)*, 216.

Spark arresters, burden of proving negligence. *Toledo, St. L. & W. R. Co. v. Fenstermaker (Ind.)*, 855.

Sufficiency of negative testimony to warrant finding either that the engine was not properly equipped or operated, and that defendant had not rebutted the presumption of negligence raised against it. *St. Louis, I. M. & S. Ry. Co. v. Coombs (Ark.)*, 480.

Weight of evidence, proper instruction. *Toledo, St. L. & W. R. Co. v. Fenstermaker (Ind.)*, 855.

Where an engine passed by inflammable material immediately before the discovery of the fire, the jury, in the absence of proof explaining its origin, may infer that it originated from sparks from the engine. *St. Louis, I. M. & S. Ry. Co. v. Coombs (Ark.)*, 480.

FIXING VALUE.

See CARRIERS OF GOODS; CARRIERS OF LIVE STOCK.

FLAGMEN.

See CROSSINGS; FELLOW SERVANTS; MASTER AND SERVANT.

FLOODS.

See WATER AND WATERCOURSES.

FOOTPATH.

See ACCIDENTS ON TRACK; LICENSEES.

FORCE.

See TRESPASSERS.

FOREMAN.

See MASTER AND SERVANT.

FREIGHT.

See CARRIERS; CONNECTING CARRIERS; CROSSINGS; RAILROADS IN STREETS; WAREHOUSEMEN.

FREIGHT TRAINS.

See CARRIERS OF PASSENGERS.

FRONTAGE ON ANOTHER RAILROAD.

See EMINENT DOMAIN.

GATES.

See CROSSINGS; STOCK, INJURIES TO.

GOD.

See NEGLIGENCE; WATER AND WATERCOURSES.

GRANTS.

See PUBLIC LANDS.

GROSS NEGLIGENCE.

See CARRIERS OF PASSENGERS; FELLOW SERVANTS;
STREET RAILWAYS.

GROUNDS.

See STATIONS AND DEPOTS.

GUARD BARS.

See CARRIERS OF PASSENGERS.

GUNS.

See CARRIERS OF PASSENGERS.

HACKMEN.

See STATIONS AND DEPOTS.

HAND-BAGS.

See BAGGAGE.

HARMLESS ERROR.

See DEATH BY WRONGFUL ACT.

HIGHWAYS:

See EMINENT DOMAIN; STREETS AND HIGHWAYS.

HIGHWAYS ACROSS RAILROADS.

See CROSSINGS.

HOISTS.

See RAILROADS.

HOMESTEADS.

See PUBLIC LANDS.

HORSES.

See FRIGHTENING TEAMS; STOCK, INJURIES TO.

HUSBAND AND WIFE.

See DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

ICE FURNISHED BY SHIPPER.

See CARRIERS OF FREIGHT.

ILLITERATES.

See BILLS OF LADING.

IMPAIRMENT OF CONTRACT OBLIGATIONS.

See STREET RAILWAYS.

IMPEACHMENT.

See WITNESSES.

IMPROVEMENTS.

See EVIDENCE.

IMPUTED NEGLIGENCE.

See CHILDREN; MASTER AND SERVANT; NEGLIGENCE;
STREET RAILWAYS.

Livery stable driver's negligence was not imputable to occupant of vehicle. *Sluder v. St. Louis Transit Co. (Mo.)*, 293.

INCIDENTAL BENEFITS.

See EMINENT DOMAIN.

INCOMPETENCY OF FELLOW SERVANT.

See MASTER AND SERVANT.

INDEFINITENESS.

See NEGLIGENCE.

INDEMNIFYING LESSOR AGAINST NEGLIGENCE.

See LEASES AND RUNNING POWERS.

INDEPENDENT ACT.

See DAMAGES.

INDEPENDENT CONTRACTORS.

See MASTER AND SERVANT.

INDICTMENTS.

See CARRIERS OF PASSENGERS.

INDORSEMENT ON COPY OF LIEN STATEMENT.

See LIENS.

INITIAL CARRIERS.

See BAGGAGE.

INJURIES TO PROPERTY.

See BRIDGES; MASTER AND SERVANT; WATER AND
WATERCOURSES.

Damages.

Measure of damages for removal of soil, instruction properly refused as not warranted by issues or evidence. *Parrott v. Chicago Great Western Ry. Co. (Iowa)*, 253.

Soil, damages for removal cut down from \$450 to \$300. *Parrott v. Chicago Great Western Ry. Co. (Iowa)*, 253.

Soil, damages for removal should have been estimated on basis of plaintiff's entire farm, considered as a unit, instead of merely on the basis of narrow strips of land along the railroad track. *Parrott v. Chicago Great Western Ry. Co. (Iowa)*, 253.

Soil, measure of damages for removal. *Parrott v. Chicago Great Western Ry. Co. (Iowa)*, 253.

Evidence.

In action for damages to realty, it is not reversible error to permit witnesses to give difference between values of the land before and after the injury without first stating such values. *Parrott v. Chicago Great Western Ry. Co. (Iowa)*, 253.

INSPECTION BY SHIPPER.

See CARRIERS OF GOODS.

INSTIGATING ARREST OF PASSENGER.

See CARRIERS OF PASSENGERS.

INSTRUCTIONS.

See CARRIERS OF FREIGHT; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; EMINENT DOMAIN; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; NEGLIGENCE; STOCK, INJURIES TO; STREET RAILWAYS.

INSURANCE INCREASED.

See EMINENT DOMAIN.

INTERCHANGE OF FREIGHT.

See CONNECTING CARRIERS.

INTERMEDIATE STATIONS.

See CARRIERS OF PASSENGERS.

INTERSTATE COMMERCE.

See CARRIERS OF FREIGHT.

Jurisdiction, in federal circuit court, of original proceedings by mandamus to compel carrier to make report which Interstate Commerce Commission is authorized to require, whether it can be inferred from certain legislation. *United States ex rel. Knapp v. Lake Shore, etc., Ry. Co.* (U. S.), 93.

Md. Acts 1904, p. 186, c. 109, requiring separate coaches to be provided for and be occupied by white and colored passengers, is invalid as to interstate passengers under commerce clause of federal constitution. *Hart v. State* (Md.), 622.

INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE.

INTERVENING CAUSE.

See CHILDREN.

INTOXICATION.

See ACCIDENTS ON TRACK; CARRIERS OF FREIGHT; CARRIERS OF PASSENGERS; CROSSINGS.

INTRASTATE COMMERCE.

See CARRIERS OF FREIGHT; CARRIERS OF PASSENGERS.

INVENTIONS.

See MASTER AND SERVANT.

INVITATION.

See LICENSEES.

INVITATION TO ALIGHT.

See CARRIERS OF PASSENGERS.

ISSUES.

See STOCK, INJURIES TO.

JERKS AND JOLTS.

See CARRIERS OF PASSENGERS.

JOLTS AND JARS.

See CARRIERS OF PASSENGERS.

JUDGMENTS.

See LIENS.

JUDICIAL DISCRETION.

See WITNESSES.

JUDICIAL NOTICE.

See EMINENT DOMAIN.

JURISDICTION.

See INTERSTATE COMMERCE.

JURORS.

See EMINENT DOMAIN.

KICKING CARS.

See CROSSINGS.

KNOWLEDGE OF INCOMPETENCY OF FELLOW SERVANTS.

See MASTER AND SERVANT.

KNOWLEDGE OF SERVANT NOT NOTICE TO MASTER.

See STATIONS AND DEPOTS.

LABOR DISTURBANCES.

See CARRIERS OF FREIGHT.

LAND.

See INJURIES TO PROPERTY.

LAND GRANTS.

See PUBLIC LANDS.

LANDLORD AND TENANT.

See CHILDREN.

LAND NOT TAKEN.

See EMINENT DOMAIN.

LAST CLEAR CHANCE.

See NEGLIGENCE.

LAW OF THE ROAD.

See STREET RAILWAYS.

LEASES AND RUNNING POWERS.

See WAREHOUSEMEN.

Lessee contracting to indemnify lessor railroad against negligence, implied inhibition did not extend to injuries in which public had no interest. So held in action for negligently running an engine against a shed built on the premises pursuant to the lease, and that part of the contract covering the injury, being severable from the rest of the contract of indemnity, was enforceable. *Osgood v. Central Vermont R. Co. (Vt.)*, 699.

LEAVING SEAT.

See CARRIERS OF PASSENGERS.

LEGISLATIVE POWERS.

See CONSTITUTIONAL LAW.

LICENSEES.

See CHILDREN; STATIONS AND DEPOTS.

Care due mere licensee on railroad premises for his own pleasure.

Dalin v. Worcester Consol. St. Ry. Co. (Mass.), 476.

Lookouts, duty to have on cars backing over depot grounds, to prevent injuries to licensees. *Willis v. Vicksburg, S. & P. Ry. (La.)*, 590.

Presumption of negligence, from fact that licensee was killed by cars being backed over depot grounds without a lookout upon them, was not rebutted. *Willis v. Vicksburg, S. & P. Ry. (La.)*, 590.

Prima facie evidence of negligence shown by fact that licensee was killed by reason of cars being backed over depot grounds without a lookout upon them. *Willis v. Vicksburg, S. & P. Ry. (La.)*, 590.

Railroad liable for backing engine and tender, without a lookout, against licensee on depot grounds. *Willis v. Vicksburg, S. & P. Ry. (La.)*, 590.

Removal of fence between railroads tenements and its car barn did not constitute an invitation or permission to its tenants to use the roof of the barn outside of the original enclosure of the barn. *Dalin v. Worcester Consol. St. Ry. Co. (Mass.)*, 476.

Yards about a passenger depot are a public place; and one is not a trespasser who follows a pedestrian beaten path in them in the attempt to get on a train about to leave, although such path is some feet away from the depot. *Willis v. Vicksburg, S. & P. Ry. (La.)*, 590.

LIENS.

Comp. St. 1887, of Montana, div. 5, § 707, declaring that a judgment against any railway corporation for any injury to person or property shall be a lien superior to that of any mortgage or trust deed, has no application to street railroads. *Daly B. & T. Co. v. Great Falls St. Ry. Co. (Mont.)*, 692.

Indorsement on copy of lien statement, stating that it was served on certain person, described as station agent for defendant railroad, was insufficient to show that it was left at the business office of defendant corporation, with the agent in charge. *Williams & Pearson v. Dittenhoefer (Mo.)*, 723.

Under Mo. Rev. St. 1899, § 4241, declaring that all persons claiming a lien on railroad property shall serve a copy of the account on the person or corporation owning or operating the railroad, service on a station agent is insufficient. *Williams & Pearson v. Dittenhoefer (Mo.)*, 723.

LIGHTS.

See CARRIERS OF PASSENGERS; STATIONS AND DEPOTS.

LIMITATIONS OF ACTIONS.

See PUBLIC LANDS.

LIMITING LIABILITY.

See BAGGAGE; BILLS OF LADING; CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS.

LIVERY STABLES.

See IMPUTED NEGLIGENCE.

LOCAL ASSESSMENTS.

Land necessary for railroad tracks and buildings and used for railroad purposes solely is not "especially benefited" by the paving of the street in front of it, so as to be subject to assessment therefor under 7 Conn. Sp. Laws, p. 217. *Naugatuck R. Co. v. City of Waterbury* (Conn.), 314.

LOCAL CARRIERS.

See STATIONS AND DEPOTS.

LOCOMOTIVES.

See FIRES SET BY LOCOMOTIVES.

LOGGING RAILROADS.

Care required in maintaining road. *Demko v. Carbon Hill Coal Co.* (C. C. A.), 232.

Contributory Negligence.

Brakeman, in riding in dangerous position, without necessity, when car was derailed, was guilty of contributory negligence precluding recovery for his injuries. *Demko v. Carbon Hill Coal Co.* (C. C. A.), 232.

LOOKOUTS.

See ACCIDENTS ON TRACK; LICENSEES; STOCK, INJURIES TO.

LOSS OF FREIGHT.

See CARRIERS OF GOODS; CONNECTING CARRIERS.

LOSS OF SELF CONTROL.

See CROSSINGS.

LOSS OF SERVICES.

See CHILDREN; PERSONAL INJURIES.

LYING ON TRACK.

See ACCIDENTS ON TRACK.

MACHINERY.

See CARRIERS OF GOODS.

MAKING UP TRAINS.

See FELLOW SERVANTS.

MALICIOUS TORTS OF EMPLOYEES.

See MASTER AND SERVANT.

MANDAMUS.

See INTERSTATE COMMERCE.

MANIFESTATIONS OF PAIN.

See CHILDREN.

MARKET VALUE.

See EMINENT DOMAIN.

MASTER AND SERVANT.

See BAGGAGE; CARRIERS OF FREIGHT; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; LOGGING RAILROADS; NEGLIGENCE; PERSONAL INJURIES; RAILROADS IN STREETS; STATIONS AND DEPOTS.

MASTER AND SERVANT—Continued.**Assumption of Risk.**

Brakeman did not assume risk of violation by other employees of a rule requiring cars standing on a grade to be coupled together. *St. Louis Southwestern Ry. Co. v. Pope* (Tex.), 736.

Brakeman injured by fall into open culvert assumed the risk. *Southern Pac. Co. v. Gloyd* (C. C. A.), 408.

Brakeman, in violation of rule, and unnecessarily, going between moving cars. *Moore v. St. Louis, I. M. & S. Ry. Co.* (La.), 370.

Car repairer at work on car on main line does not assume risk of injury from car escaping from switch track and running on to main line. *Smith v. Fordyce* (Mo.), 378.

Defendant must ask for instructions on. *Smith v. Fordyce* (Mo.), 378.

Location of flagman's watch box near track, risks assumed, and not assumed, by him. *Philadelphia, B. & W. R. Co. v. Devers* (Md.), 366.

Lumber improperly piled by incompetent fellow servants, injury to experienced employee who knew of such incompetency, and did not object and knew that there was improperly piled lumber in the yard. *Hull v. Northern Pac. Ry. Co.* (C. C. A.), 265.

Question for jury where brakeman was injured while coupling cars. *Taylor v. Boston & M. R. R.* (Mass.), 397.

Section hand injured while pushing a tie into a car, either through the slipping of one of the planks of a temporary platform which he had assisted in making, or by his slipping after stepping onto the ties which formed part of such platform, which was wet and muddy. *Dunn v. Oregon Short Line R. Co.* (Utah), 741.

Switch yard conductor, in taking dining car to yard at a junction, placing engine behind and leaving no light in front of the car, except a lantern, which he held in his hand while standing on front platform, right to recover for injuries sustained in a collision as affected by fact that he did so by direction of yard master, his superior, when he knew the risks. *Southern Ry. Co. v. Logan* (C. C. A.), 374.

Care required of employees in charge of switching operations. *Struble v. Burlington, C. R. & N. Ry. Co.* (Iowa), 259.

Care required of master to discover that servant employed on construction train was in danger of being injured by sudden starting of train while he was standing between train and edge of trestle, in obedience to orders, instruction erroneous for not stating. *Dean v. Oregon R. & Nav. Co.* (Wash.), 237.

Contributory Negligence.

Brakeman was not guilty of in assuming, when passing along the roofs of cars standing on a siding, that they were coupled together, as required by a rule of his company. *St. Louis Southwestern Ry. Co. v. Pope* (Tex.), 736.

Engineer was not guilty of, in violation of rules, in taking his engine onto main track, on the time of a passenger train; he having taken the prescribed steps for giving notice of his presence. *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 729.

Insufficiency of evidence of, in action for injury to brakeman engaged in switching. *Struble v. Burlington, C. R. & N. Ry. Co.* (Iowa), 259.

Question for jury where brakeman was injured while coupling cars. *Taylor v. Boston & M. R. R.* (Mass.), 397.

Degree of care required of master in constructing culverts is not such as he would ordinarily use if the danger to be guarded against was a personal danger to himself. *Southern Pac. Co. v. Gloyd* (C. C. A.), 408.

MASTER AND SERVANT—Continued.

Degree of care required of master in furnishing safe place to work and its appliances. *Southern Pac. Co. v. Gloyd* (C. C. A.), 408.

Degree of care required of master in procuring and keeping its appliances in good condition. *Smith v. Fordyce* (Mo.), 378.

Duty of master to keep construction train still while servant, in obedience to orders, was standing on narrow trestle beside car. *Dean v. Oregon R. & Nav. Co.* (Wash.), 237.

Evidence.

Derailing switch, practical railroad man properly permitted to testify as to its purpose and as to where one should be placed. *Smith v. Fordyce* (Mo.), 378.

In action for injuries to car repairer by car escaping from switch track onto track where he was at work, it was competent to show absence of derailing switch at junction of switch track and other track, and that such a device was in common use by defendant. *Smith v. Fordyce* (Mo.), 378.

Flagman injured by reason of the negligent replacement of his watch box too near track, instruction properly submitted questions of railroad's negligence. *Philadelphia, B. & W. R. Co. v. Devers* (Md.), 366.

Flagman's watch box was an appliance or place which the railroad was personally bound to exercise reasonable care to construct and maintain in a safe condition, and it was liable for its negligent replacement too near track by flagman's fellow servant. *Philadelphia, B. & W. R. Co. v. Devers* (Md.), 366.

In action by brakeman, for personal injuries sustained by him while on top of a car, an instruction was erroneous, in that the jury, under it, might have found that the condition of the cars was unsafe as to others than plaintiff, and yet have returned a verdict against defendant. *St. Louis Southwestern Ry. Co. v. Pope* (Tex.), 736.

In action for injuries to car repairer, injured by escape of car from switch track, evidence warranted a finding that brake on the car had not been set when car was set out. *Smith v. Fordyce* (Mo.), 378.

In action for injury to car repairer, based on negligence in not properly securing car on switch track, which led to a mine, so as to prevent the car from running down onto main track, though evidence showed that employers of the mine removed the blocks which held the car in place, there was no failure of proof because of the fact that there was no allegation in petition as to the moving of the car by the mining crew. *Smith v. Fordyce* (Mo.), 378.

In an action against a master for the death of a servant, it was error to instruct that, if deceased was guilty of negligence, plaintiff could not recover, unless defendant was so willfully negligent as to show an utter disregard for the life of deceased, and that the negligence of deceased was but slight as compared with that of defendant. *Denver & R. G. R. Co. v. Maydole* (Colo.), 762.

Independent contractor, contractor was not, but was the servant of railroad, for whose tort in removing soil from private property the railroad was liable. *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 253.

Insufficiency of evidence of negligence in failing to provide sufficient help on switching train, and in providing a yard crew incapacitated from over work, in action for injuries sustained by fireman in a collision. *Rosney v. Erie R. Co.* (C. C. A.), 751.

Master not bound to adopt every new invention. *Smith v. Fordyce* (Mo.), 378.

Master not liable for injury to his blacksmith on account of foreman hiring an inefficient striker, as the foreman was not bound

MASTER AND SERVANT—Continued.

- to anticipate that such striker would attempt to do that in which he was not skilled. *Hilton v. Fitchburg R. R.* (N. H.), 757.
- Master's duties to a servant as to employing other servants and retaining none but suitable servants. *Hilton v. Fitchburg R. R.* (N. H.), 757.
- Minors, railroad not at fault in employing as a brakeman an intelligent young man of 19, who has appearance of being 22 or 25 years of age, in the absence of any objection from his parents or tutor. *Moore v. St. Louis, I. M. & S. Ry. Co.* (La.), 370.
- Negligence for locomotive engineer to suddenly stop train when brakeman was passing along the roofs of cars. *St. Louis Southwestern Ry. Co. v. Pope* (Tex.), 736.
- Negligence of engineer was not imputable to conductor of freight train killed in a collision, at point where he was unable to control former's action by signals. *St. Louis & S. F. R. Co. v. McFall* (Ark.), 243.
- Negligence of train dispatcher causing injury to engineer, sufficiency of evidence. *Santa Fe Pac. R. Co. v. Holmes* (C. C. A.), 248.
- Negligence question for jury, in action for injury to employee. *Illinois Cent. R. Co. v. Elliott* (Ky.), 145.
- Open culvert, master was not liable for injury to brakeman caused by fall into. *Southern Pac. Co. v. Gloyd* (C. C. A.), 408.
- Presumption that master has exercised proper care in employing other servants. *Hilton v. Fitchburg R. R.* (N. H.), 757.
- Proximate cause of injury to brakeman was the negligence of employee in charge of switching work. *Struble v. Burlington, C. R. & N. Ry. Co.* (Iowa), 259.
- Proximate cause of injury to employee employed on construction train was not the proximity of side of car to edge of trestle, but the unexpected starting of the car while he was standing on trestle. *Dean v. Oregon R. & Nav. Co.* (Wash.), 237.
- Question for jury, in action for injuries to a car repairer from escape of car from switch track, whether defendant should have had derailing switch at the junction of the switch track and that on which accident happened. *Smith v. Fordyce* (Mo.), 378.
- Rule prohibiting employees from riding on locomotives, construction was for the court. *Denver & R. G. R. Co. v. Maydole* (Colo.), 762.
- Scope of employment, distinction, as affecting master's responsibility, between act done within and act committed during employment. *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 269.
- Scope of employment, servant must have been acting within to render master responsible. *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 269.
- Scope of employment, where one, who was defendant's station agent and also acted as express company's agent, killed a person while he was signing a receipt book for a package,—it could not be assumed that the package contained freight matter, and not express matter. *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 269.
- Sufficiency of yard rules to protect trains from collision. *Rosney v. Erie R. Co.* (C. C. A.), 751.
- Where railroad failed to provide derailing switch at junction of switch track and main track, and car was set out on switch track, with its brake loose, and the brake wheel inaccessible because obstructed with timbers, and employees of a mining company which used the switch track negligently moved the car whereby it ran onto the main track, injuring a car repairer, the negligence of the mine employees did not relieve the railroad of responsibility for the proximate cause of the injury. *Smith v. Fordyce* (Mo.), 378.
- Where the rule of a railroad company required cars standing on a grade siding to be coupled, and an engineer, in moving cars that

MASTER AND SERVANT—Continued.

had been so standing, suddenly stopped the train, whereby certain cars not coupled parted causing an injury to a brakeman, if the manner of stopping the engine would not have been negligence in case the cars were coupled, it was not negligence because of the conditions not known to the engineer. *Hilton v. Fitchburg R. R.* (N. H.), 757.

Who Are Employees.

Independent contractors, test as to whether or not they are employees, so as to render their employers responsible for their negligence. *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 253.

MATTERS OF OMISSION.

See NEGLIGENCE.

MERE ACCEPTANCE OF TICKET AND CHECK.

See BAGGAGE.

MINERALS.

See EMINENT DOMAIN.

MINORS.

See MASTER AND SERVANT.

MISTAKES.

See TICKETS AND FARES.

MONEY.

See CHILDREN.

MOTIVE POWER.

See EMINENT DOMAIN.

MOTORMEN.

See STREET RAILWAYS.

MOVING CARS.

See CHILDREN.

MOVING TRAINS.

See CARRIERS OF PASSENGERS.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW; STREET RAILWAYS.

MURDER.

See STATIONS AND DEPOTS.

NAVIGATION.

See BRIDGES.

NEGATIVE AND AFFIRMATIVE TESTIMONY AS TO SIGNALS.

See CROSSINGS.

NEGATIVE TESTIMONY.

See FIRES SET BY LOCOMOTIVES.

NEGLIGENCE.

See ACCIDENTS ON TRACK; BAGGAGE; BRIDGES; CARRIERS OF FREIGHT; CARRIERS OF PASSENGERS; CHILDREN; CONNECTING CARRIERS; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; LEASES AND RUNNING POWERS; MASTER AND SERVANTS; PERSONAL INJURIES; RAILROADS IN STREETS; STOCK, INJURIES TO; TICKETS AND FARES; WATER AND WATERCOURSES; WITNESSES.

Act of God is a defense which must be pleaded. *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.)*, 207.

Comparative negligence, doctrine does not obtain in Washington. *Woolf v. Washington Ry. & Nav. Co. (Wash.)*, 846.

Definition, instruction was not open to objection that matters of omission were excluded from consideration. *Struble v. Burlington, C. R. & N. Ry. Co. (Iowa)*, 259.

Degree of care required of persons having charge of dangerous explosives, such as firearms or dynamite, to guard against injury to others. *Mattson v. Minnesota & N. W. R. Co. (Minn.)*, 502.

Evidence.

Professed tests of air brakes appearing in the back of a book of instructions, which are but advertisements of the makers, are not admissible, in an action against a railroad for negligence, as evidence of the distance required for stopping a train with such brakes. *Illinois Cent. R. Co. v. Stith's Adm'x (Ky.)*, 729.

Imputable negligence of servant driving master. *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 838.

Indefinite complaint having been treated by both parties as charging ordinary negligence, instead of willful injury, will be so treated on appeal. *Morey v. Lake Superior Terminal & Transfer Ry. Co. (Wis.)*, 113.

Instruction defining was not objectionable as eliminating acts of commission. *German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa)*, 494.

Instructions requested in an action for negligence was properly refused, as either covered by the general charge, or as omitting pertinent facts shown by the evidence. *Texas & P. Ry. Co. v. Coutourie (C. C. A.)*, 642.

Last clear chance, doctrine held not applicable. *McLean v. Omaha & C. B. Ry. & Bridge Co. (Neb.)*, 119.

Question for jury when evidence is conflicting. *Price v. St. Louis, I. M. & S. Ry. Co. (Ark.)*, 534.

Willfulness and wantonness, definitions. *Montgomery St. Ry. v. Rice (Ala.)*, 499.

NEGLIGENCE AFTER DISCOVERY OF PERIL.

See TRESPASSERS.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF PASSENGERS.

NEGROES.

See CARRIERS OF PASSENGERS; INTERSTATE COMMERCE.

NERVOUS SYSTEM.

See PERSONAL INJURIES.

NEXT TRAIN.

See CARRIERS OF PASSENGERS; TICKETS AND FARES.

NONASSIGNABLE DUTIES.

See FELLOW SERVANTS.

NOTICE.

See LIENS.

NOTICE OF CLAIMS.

See CARRIERS OF LIVE STOCK.

NOTICE OF DEFECTS.

See MASTER AND SERVANT.

NOTICE OF SPECIAL CIRCUMSTANCES.

See CARRIERS OF GOODS.

NOTICE OF SPECIAL PURPOSE.

See CARRIERS OF GOODS.

NOTICE TO CONSIGNEE.

See CARRIERS OF FREIGHT.

NOTICE TO MASTER.

See STATIONS AND DEPOTS.

OBSTRUCTED VIEW.

See CROSSINGS.

OBVIOUS DANGERS.

See CARRIERS OF PASSENGERS.

OFFER TO CARRY.

See CARRIERS OF PASSENGERS.

OFFICERS.

See EVIDENCE.

OIL LANDS.

See EMINENT DOMAIN.

OMISSIONS.

See NEGLIGENCE.

OPEN CULVERTS.

See MASTER AND SERVANT.

OPEN GATES.

See CROSSINGS.

OPINION EVIDENCE.

See EMINENT DOMAIN; STREET RAILWAYS.

ORDINANCES.

See CARRIERS OF PASSENGERS; CONSTITUTIONAL LAW; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

ORIGIN.

See FIRES SET BY LOCOMOTIVES.

OTHER FIRES.

See FIRES SET BY LOCOMOTIVES.

OVERFLOWS.

See WATER AND WATERCOURSES.

OVERHEAD CROSSINGS.

See CROSSINGS.

OWNERSHIP.

See CARRIERS OF GOODS.

OWNERSHIP OF LAND.

See EMINENT DOMAIN.

PAIN.

See CHILDREN.

PARENT AND CHILD.

See DEATH BY WRONGFUL ACT.

PARENT'S NEGLIGENCE.

See CHILDREN.

PARK PURPOSES.

See EMINENT DOMAIN.

PASSAGEWAYS.

See STATIONS AND DEPOTS.

PASSENGERS.

See CARRIERS OF PASSENGERS; CHILDREN.

PAVING.

See LOCAL ASSESSMENTS; STREET RAILWAYS.

PECUNIARY CIRCUMSTANCES.

See PERSONAL INJURIES.

PECUNIARY LOSS.

See DEATH BY WRONGFUL ACT.

PEDESTRIANS.

See ACCIDENTS ON TRACK; CROSSINGS; STREET RAILWAYS; RAILROADS IN STREETS.

PENAL STATUTES.

See CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; STOCK, INJURIES TO.

PERMISSION.

See LICENSEES.

PERSONAL INJURIES.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; LICENSEES; MASTER AND SERVANT; RAILROADS IN STREETS; TRESPASSERS; WITNESSES.

Damages.

Elements of damages recoverable by husband for injuries to wife, and to vehicle in which wife was driving, and to harness

PERSONAL INJURIES—Continued.

and horse, was properly laid in one complaint, and all in each count of complaint. *Birmingham Southern Ry. Co. v. Lintner* (Ala.), 225.

Husband not entitled to recover for any loss of services of his wife which may occur in the future because of injuries inflicted by defendant. *Hull v. Northern Pac. Ry. Co.* (C. C. A.), 265.

Husband's right to recover for injuries to wife, under Alabama Code 1873, § 2521, providing that the earnings of the wife are her separate property, but that she is not entitled to compensation for services rendered to or for her husband. *Birmingham Southern Ry. Co. v. Lintner* (Ala.), 225.

In action for injuries to physician, which interfered with his practice, it was proper to permit him to testify as to his earnings for that month in the previous year. *Sluder v. St. Louis Transit Co.* (Mo.), 293.

Instruction was not objectionable for failing to give elements of damage, no instruction on such matter having been requested by defendant. *Smith v. Fordyce* (Mo.), 378.

Permitting plaintiff to testify as to size of his family, and, in answer as to how much help he had from his children, that he had not a great deal "until this year"; that a boy 16 years old "and this boy I have here * * * are all the boys I have old enough" was reversible error. *St. Louis, I. M. & S. Ry. Co. v. Adams* (Ark.), 843.

Seven thousand five hundred dollars for loss of use of left arm by man of 26 years was not excessive. *Smith v. Fordyce* (Mo.), 378.

Six thousand dollars was not excessive for loss of one toe and part of another, and incidental suffering, and medical expenses and loss of time. *Rapp v. St. Louis Transit Co.* (Mo.), 419.

Twelve thousand dollars was excessive verdict for loss of brakeman's left arm and the incidental suffering, and was reduced to \$7,500. *Struble v. Burlington, C. R. & N. Ry. Co.* (Iowa), 259.

Verdict for \$500 warranted by evidence. *St. Louis Southwestern Ry. Co. v. Underwood* (Ark.), 134.

Where complaint alleged that plaintiff had expended \$200 for medical attendance, failure of court to limit jury to \$200 in such regard was not error, there being no evidence on the subject except the \$200 bill. *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 26.

Evidence.

Sufferings of wife at time of trial, in action by husband, under laws of Alabama. *Birmingham Southern Ry. Co. v. Lintner* (Ala.), 225.

Husband's right of action for injury to wife, under Louisiana statutes. *St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.), 779.

Injury to nervous system, evidence was sufficient to justify instruction that if jury found permanent impairment and destruction of plaintiff's nervous system, etc., the word "destruction" being used not in the sense of a total loss of nerve force, but as meaning an enfeeblement or impairment which would mark plaintiff's condition through life. *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 444.

Personal injury was the cause of action. *Harvey v. Louisiana Western R. Co.* (La.), 573.

Right of action depending on existence of duty owed by party causing injury toward person injured. *Wickenburg v. Minneapolis, etc., Ry. Co.* (Minn.), 824.

Torpedoes, under statute permitting pleading in alternative, petition, in action of negligently keeping, was not bad for duplicity. *Merschell v. Louisville & N. R. Co.* (Ky.), 829.

PILING LUMBER.

See MASTER AND SERVANT.

PISTOLS.

See CARRIERS OF PASSENGERS.

PLATFORMS.

See CARRIERS OF PASSENGERS; STATIONS AND DEPOTS.

PLEADING.

See CARRIERS OF GOODS; CONTRIBUTORY NEGLIGENCE; DAMAGES; EMINENT DOMAIN; NEGLIGENCE; PERSONAL INJURIES.

PLEADING AS EVIDENCE.

See DEATH BY WRONGFUL ACT.

POLICE POWERS.

See STREET RAILWAYS.

POLICE REGULATIONS.

See EMINENT DOMAIN.

POSSESSION OF MONEY.

See CHILDREN.

POWERS.

See RAILROADS.

PRACTICE.

See EMINENT DOMAIN.

PRECAUTIONS AFTER ACCIDENT.

See STOCK, INJURIES TO.

PREMISES.

See CHILDREN; LICENSEES.

PRESCRIPTION.

See PUBLIC LANDS.

PRESUMPTION OF DUE CARE.

See DEATH BY WRONGFUL ACT.

PRESUMPTION OF LOSS.

See DEATH BY WRONGFUL ACT.

PRESUMPTION OF NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; LICENSEES.

PRESUMPTIONS.

See CHILDREN; CONNECTING CARRIERS; EMINENT DOMAIN; FIRES SET BY LOCOMOTIVES.

PRICE OF OTHER LAND.

See EMINENT DOMAIN.

PRIMA FACIE CASE.

See FIRES SET BY LOCOMOTIVES.

PRIMARY CAUSE.

See BRIDGES.

PRIVATE CROSSINGS.

See CROSSINGS; STOCK, INJURIES TO.

PROPERTY RIGHTS.

See PUBLIC LANDS.

PROSPECTIVE PASSENGERS.

See CARRIERS OF PASSENGERS.

PROTECTING PASSENGERS AGAINST OTHER PASSENGERS.

See CARRIERS OF PASSENGERS.

PROTECTION OF PASSENGERS AGAINST THIRD PARTIES.

See CARRIERS OF PASSENGERS.

PROXIMATE CAUSE.

See BRIDGES; CHILDREN; CROSSINGS; FELLOW SERVANTS; MASTER AND SERVANT; NEGLIGENCE.

PROXIMITY OF TROLLEY POLES.

See CARRIERS OF PASSENGERS.

PUBLIC LANDS.

Adverse possession of land granted by Congress for railroad right of way. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Compliance with act of Congress granting right of way to Utah & Northern Ry. Co., so far as settlers are concerned. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Grant by Congress of railroad right of way not an absolute fee for all purposes. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Grant of right of way by Congress to Utah & Northern Ry. Co. became definitely fixed by the actual construction of the road as effectually as it could have been by the filing of the map of location. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Limitations will not run against an action to maintain integrity of right of way granted by Congress for specific use and purpose. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Power of Congress over public lands. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Power of railroad to convey land granted by Congress to it for right of way. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

Scope of grant of right of way by Congress to Utah & Northern Ry. Co. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

When right of property vests in settler. Oregon Short Line R. Co. *v.* Quigley (Idaho), 1.

PUBLIC POLICY.

See DEATH BY WRONGFUL ACT; LEASES AND RUNNING POWERS; RAILROADS.

PUNITIVE DAMAGES.

See DAMAGES.

RAILROAD COMMISSIONS.

See CARRIERS OF FREIGHT.

RAILROADS.

See EVIDENCE; LIENS; LOGGING RAILROADS; PUBLIC LANDS.

Railroad companies chartered under the general law may acquire and operate steamboats in connection with their lines of road. *Graham & Ward v. Macon, D. & S. R. Co. (Ga.)*, 47.

Steamboat company was, at least, entitled to nominal damages for breach of contract purporting to give it possession of and right to operate. *Graham & Ward v. Macon, D. & S. R. Co. (Ga.)*, 47.

Steamboat, contract by which railroad acquired possession of and right to operate, in consideration of its agreement to erect hoist for handling freight between boat and cars, not against public policy. *Graham & Ward v. Macon, D. & S. R. Co. (Ga.)*, 47.

Steamboat, validity of contract by which company acquired possession of and right to operate. *Graham & Ward v. Macon, D. & S. R. Co. (Ga.)*, 47.

RAILROADS IN STREETS.

See CROSSINGS; ELEVATED RAILWAYS; STOCK, INJURIES TO; TRESPASSERS.

Contributory Negligence.

Boy, injured by ice kicked by brakeman from passing train, was not guilty of contributory negligence in standing near train. *Willis v. Maysville & B. S. R. Co. (Ky.)*, 832.

Person using railroad track as thoroughfare has right to presume that trains will not violate speed ordinance, and will give signals. *Illinois Terminal R. Co. v. Mitchell (Ill.)*, 835.

Unloading cars, duty to avoid injuring pedestrians. *St. Louis Southwestern Ry. Co. v. Underwood (Ark.)*, 134.

Where boy was injured by ice kicked by brakeman from passing caboose, the question whether the brakeman was acting within scope of his authority was for the jury. *Willis v. Maysville & B. S. R. Co. (Ky.)*, 832.

Where boy was injured by ice kicked by brakeman from passing train, a reasonable inference that brakeman was within scope of his authority was sufficient to show that his master was responsible for his act. *Willis v. Maysville & B. S. R. Co. (Ky.)*, 832.

Where pedestrian was struck by train which approached at excessive speed and without signals, defendant in action for his injuries were not entitled to a peremptory instruction. *Illinois Terminal R. Co. v. Mitchell (Ill.)*, 835.

RAILS.

See STREET RAILWAYS.

REAL ESTATE.

See INJURIES TO PROPERTY.

RECEIVING PASSENGERS.

See CARRIERS OF PASSENGERS.

RECEPTION ROOMS.

See CARRIERS OF PASSENGERS.

RECORDATION.

See STREET RAILWAYS.

REFRIGERATOR CARS.

See CARRIERS OF FREIGHT.

REFUSAL TO SELL TICKET.

See TICKETS AND FARES.

RELIANCE UPON COMPLIANCE WITH RULE.

See MASTER AND SERVANT.

RELOADING AT TERMINAL POINTS.

See CARRIERS OF FREIGHT.

REMARKS OF COUNSEL.

See STOCK, INJURIES TO.

REMOTE CAUSE.

See CARRIERS OF FREIGHT.

REMOTE DAMAGES.

See EMINENT DOMAIN.

REMOVAL OF FENCES.

See LICENSEES.

REMOVAL OF SOIL.

See INJURIES TO PROPERTY.

REPAIRING TRACK.

See STOCK, INJURIES TO.

REPAIRS.

See EMPLOYERS' LIABILITY ACTS; STOCK, INJURIES TO.

REPORTS.

See INTERSTATE COMMERCE.

RESHIPPING FACILITIES.

See CARRIERS OF FREIGHT.

RES IPSA LOQUITUR.

See CARRIERS OF PASSENGERS.

RESISTING ARREST OF PASSENGER.

See CARRIERS OF PASSENGERS.

REVIEW.

See APPEAL; CONTRIBUTORY NEGLIGENCE.

RIDING IN DANGEROUS POSITION.

See LOGGING RAILROADS.

RIDING ON RUNNING BOARD.

See CARRIERS OF PASSENGERS.

RIGHT OF ACTION.

See DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

RIGHT OF WAY.

See CROSSINGS; PUBLIC LANDS; STREET RAILWAYS.

RIPARIAN PROPRIETORS.

See WATER AND WATERCOURSES.

RIVERS.

See WATER AND WATERCOURSES.

ROADBED.

See LOGGING RAILROADS.

ROLLING STOCK.

See STREET RAILWAYS.

ROUNDHOUSES.

See FELLOW SERVANTS.

ROUTE.

See CONNECTING CARRIERS.

RULES.

See MASTER AND SERVANT.

RUNNING BOARDS.

See CARRIERS OF PASSENGERS.

SAFE PLACE TO UNLOAD.

See CARRIERS OF FREIGHT.

SAFE PLACE TO WORK.

See FELLOW SERVANTS.

SALES.

See EMINENT DOMAIN.

SATCHELS.

See BAGGAGE.

SCHEDULES AND TIME TABLES.

See CARRIERS OF PASSENGERS; TICKETS AND FARES.

SCOPE OF CONDUCTOR'S AUTHORITY.

See CARRIERS OF PASSENGERS.

SCOPE OF EMPLOYMENT.

See CARRIERS OF FREIGHT; CARRIERS OF PASSENGERS; EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT; RAILROADS IN STREETS.

SELECTION OF ROUTE.

See CONNECTING CARRIERS.

SELF PROTECTION BY MASTER.

See MASTER AND SERVANT.

SEPARATE COACHES.

See CARRIERS OF PASSENGERS.

SEPARATE WAITING ROOMS FOR WHITE AND COLORED PASSENGERS.

See CARRIERS OF PASSENGERS.

SEPARATION OF EASEMENT AND FEE.

See EMINENT DOMAIN.

SEPARATION OF WHITE AND COLORED PASSENGERS.

See CARRIERS OF PASSENGERS; INTERSTATE COMMERCE.

SERVANTS.

See EMPLOYEES' LIABILITY ACTS.

SERVICE OF NOTICE.

See LIENS.

SERVICES.

See PERSONAL INJURIES.

SETTLEMENTS.

See STOCK, INJURIES TO.

SETTLERS.

See PUBLIC LANDS.

SEVERABLE CONTRACT.

See LEASES AND RUNNING POWERS.

SHIPS.

See RAILROADS.

SHOCKS.

See CARRIERS OF PASSENGERS.

SHOPS.

See MASTER AND SERVANT.

SIGNALS.

See CROSSINGS; STOCK, INJURIES TO.

SIGNALS FOR OTHER CROSSINGS.

See CROSSINGS.

SIGNATURES.

See BILLS OF LADING.

SIZE OF FAMILY.

See PERSONAL INJURIES.

SLEEPING ON TRACK.

See ACCIDENTS ON TRACK.

SLEEPING PASSENGERS.

See CARRIERS OF PASSENGERS.

SNOW.

See ELEVATED RAILWAYS.

SNOW FENCES.

See CHILDREN.

SOIL.

See INJURIES TO PROPERTY.

SPARK ARRESTERS.

See EMINENT DOMAIN.

SPARKS.

See FIRES SET BY LOCOMOTIVES.

SPECIAL DAMAGES.

See CARRIERS OF GOODS.

SPECIAL TRAINS.

See STATIONS AND DEPOTS.

SPECULATIVE DAMAGES.

See EMINENT DOMAIN.

SPEED.

See APPEAL; CROSSINGS; EVIDENCE; RAILROADS IN STREETS; STATIONS AND DEPOTS; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

SPEED IN VIOLATION OF ORDINANCE.

See CARRIERS OF PASSENGERS.

STANDING IN CAR.

See CARRIERS OF PASSENGERS.

STANDING ON RUNNING BOARD.

See CARRIERS OF PASSENGERS.

STARTING CARS.

See CARRIERS OF PASSENGERS.

STARTING OF TRAINS.

See MASTER AND SERVANT.

STATION AGENTS.

See CARRIERS OF FREIGHT; MASTER AND SERVANT; STATIONS AND DEPOTS.

STATIONS AND DEPOTS.

See CARRIERS OF GOODS; EVIDENCE; LICENSEES.

Distinction between liability of certain classes of masters for torts of their servants and that of the proprietor of a railroad station, as to persons coming on premises to transact some business connected with its general business, pointed out. *Bowen v. Illinois Cent. R. Co. (C. C. A.)*, 269.

Lighting platform before arrival of train, reasonable time for a question for jury. *Abbott v. Oregon R. Co. (Ore.)*, 52.

Lights, knowledge of train dispatcher that passengers arriving on special train over another road at night, intending to take train on his road, did not bind his company to light its depot platform until reasonable time prior to arrival of its train. *Abbott v. Oregon R. Co. (Ore.)*, 52.

Malicious killing by station agent of person at depot to transact business relating to freight or express matter, railroad not liable because act was not committed within scope of employment. *Bowen v. Illinois Cent. R. Co. (C. C. A.)*, 269.

Railroad owed express company's deliveryman no duty to light depot or grounds, although express company had been granted privilege of storing packages in baggage room. *Texas Cent. R. Co. v. Harbison (Tex.)*, 770.

Railroad owed it to employees of express company to furnish reasonably safe passageway from depot to train. *Harvey v. Louisiana Western R. Co. (La.)*, 573.

Right of union depot company organized under 65 Ohio Laws, p. 63, to grant to transfer company exclusive privilege to use portion of depot grounds for hack stand, and that of soliciting thereon patronage of incoming passengers. *State v. Union Depot Co. (Ohio)*, 614.

Rule of union depot company excluding from depot ground all local carriers except a transfer company to which it has granted exclusive privileges relating to the patronage of incoming pas-

STATIONS AND DEPOTS—Continued.

sengers may be enforced so long as such transfer company furnishes reasonable accommodations at reasonable rates. *State v. Union Depot Co. (Ohio)*, 614.

Train approaching depot in large municipality should moderate speed. *Harvey v. Louisiana Western R. Co. (La.)*, 573.

Whether or not rate of speed was usual on night of accident to express messenger, the extent of obstruction of passageway, the place of accident at depot, the light at depot, whether sufficient or not, were questions bearing upon the issues. *Harvey v. Louisiana Western R. Co. (La.)*, 573.

STATUTES.

See CROSSINGS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES.

STATUTORY DUTIES.

See CROSSINGS.

STATUTORY PROHIBITION.

See LEASES AND RUNNING POWERS.

STEALING RIDES.

See CHILDREN.

STEAMBOATS.

See RAILROADS.

STOCK AND STOCKHOLDERS.

See WAREHOUSEMEN.

STOCK, INJURIES TO.

See ACCIDENTS ON TRACK; STREET RAILWAYS.

Allegations of negligence in operating train, though general, were sufficient to justify introduction of ordinance limiting speed of trains and providing for the giving of signals within limits of the city, where horse was struck by train. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Burden of proving value of animal killed, plaintiff not relieved of under Kirby's Dig. § 6137. *Prescott & N. W. Ry. Co. v. Brown (Ark.)*, 132.

Care required of trainmen to avoid injuring trespassing stock. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Cattle guards, it was not railroad's duty to erect them at place in pasture where it had, for the convenience of its owner, constructed crossing for the passage of cattle over railroad. *Gulf & S. I. R. Co. v. Ellis (Miss.)*, 817.

Cattle guards, sufficiency of to constitute compliance with statute. *Johnson v. Detroit & M. Ry. Co. (Mich.)*, 828.

Contributory Negligence.

Custom of riding mule along track at point where it was killed. *Prescott & N. W. Ry. Co. v. Brown (Ark.)*, 132.

Leaving team near track that was used to standing unattended and untired. *O'Leary v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 141.

Damages.

Right to recover for the hire of injured animal, instruction, though abstractly correct, was erroneous for not telling jury that they could not in any event allow more for injury and loss of hire than the sound value of the horse at the time of the injury. *Georgia Ry. & Electric Co. v. Wallace & Co. (Ga.)*, 793.

STOCK, INJURIES TO—Continued.

Two hundred dollars was not excessive, for death of horse, according to the evidence, where the only evidence to the contrary was plaintiff's verified claim, in which the value of the horse was placed at \$100, which plaintiff explained by saying that he thought if he placed the value at such amount he might get something without suit. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Degree of care required of trainmen to avoid injuring unattended team, used in repairing track, when team is seen approaching track. *O'Leary v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 141.

Duty of engineer, while passing through a town, to be on the alert, and prepared for instant action, in case stock stray upon the track. *St. Louis, I. M. & S. Ry. Co. v. Kimberlain (Ark.)*, 479.

Duty of trainmen to lookout for stock, under Kirby's Dig. § 6607. *Prescott & N. W. Ry. Co. v. Brown (Ark.)*, 132.

Engineer's testimony not conclusive where there was evidence that accident might have been avoided after the discovery that unattended team was in danger. *O'Leary v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 141.

Evidence.

Defendant having introduced evidence as to the speed of the train, it was not error for the court to receive further competent evidence offered by plaintiff on such issue. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Error in admitting incompetent evidence as to a compromise was not cured by the fact that defendant itself offered the evidence in writing to show a denial of liability. *Georgia Ry. & Electric Co. v. Wallace & Co. (Ga.)*, 793.

Of compromise was excluded because inherently harmful, and calculated to leave the impression on the minds of the jury that the settlement was an admission of responsibility, even though coupled with a denial of liability. *Georgia Ry. & Electric Co. v. Wallace & Co. (Ga.)*, 793.

Reversible error to admit evidence that after accident defendant fastened a wire between two boards of gate, where it appeared that upper board was used by stock for rubbing purposes. *Titus v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 129.

The rule which excludes propositions of compromise between the parties also excludes evidence of compromise between defendant and third persons damaged in the same casualty. *Georgia Ry. & Electric Co. v. Wallace & Co. (Ga.)*, 793.

Exemption from liability, contract was not applicable to stock killed on main line near a spur; only the latter having been laid for benefit of mill owner. *St. Louis Southwestern Ry. Co. v. Stringer (Ark.)*, 815.

Gate, how it became open was a question for jury in action for killing horse on track. *Titus v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 129.

Gate, sufficiency of construction and fastening was a question for jury. *Titus v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 129.

Improper for plaintiff's attorney to state in his opening statement that he did not know what defendant's defense would be, but presumed it would be "the same old stereotyped defense, that the mule ran upon the track, and that they did not have time to avoid the killing of the mule after they saw it"; but under the circumstances, it was no ground for reversal. *Kansas City Southern Ry. Co. v. Murphy (Ark.)*, 416.

Instruction that, if the speed of the train was sole cause of the injury, defendant was not liable, was properly refused; the issue being one of care in the operation of the train, whether slow or fast. *St. Louis & S. F. Ry. Co. v. Carlisle (Ark.)*, 462.

STOCK, INJURIES TO—Continued.

Legislative intent that a failure to fence as required by section 2057 Iowa Code should be treated as an entire failure to fence, and that the liability and penalty (double damages) provided for in section 2055 should then follow. *Titus v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 129.

Lookouts, burden on defendant to prove compliance with Kirby's Dig. § 6607. *Prescott & N. W. Ry. Co. v. Brown (Ark.)*, 132.

Lookouts, railroad liable for all damages resulting from failure to comply with Kirby's Dig. § 6607. *Prescott & N. W. Ry. Co. v. Brown (Ark.)*, 132.

Motion to direct verdict for defendant properly overruled where plaintiff had introduced evidence tending to rebut engineer's testimony that he was keeping a lookout but did not see the horse in time to avoid the accident. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Negligence of motorman in killing horse, evidence held sufficient to go to jury. *Laronde v. Boston & M. R. R. (N. H.)*, 223.

Ordinary care required of motorman to avoid killing horse wrongfully at large in street. *Laronde v. Boston & M. R. R. (N. H.)*, 223.

Plaintiff was entitled to introduce evidence to rebut engineer's testimony that he did not see the horse until too late to avoid striking him. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Railroad liable for killing mule because it appeared that animal should have been seen in time to avoid the accident. *St. Louis & S. F. Ry. Co. v. Carlisle (Ark.)*, 462.

Signals, failure to give when approaching point where men and teams are known to be at work about track may be negligence as a matter of fact, though not negligence per se arising from a failure to give the statutory crossing signals. *O'Leary v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 141.

Speed prohibited by ordinance, proof of as evidence from which jury may find that excessive speed was proximate cause of injury to team employed in repairing track and killed by train. *O'Leary v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 141.

Violation of speed ordinance, act proper for consideration of jury in determining whether defendant was negligent. *Borneman v. Chicago, St. P., M. & O. Ry. Co. (S. Dak.)*, 464.

Where court instructed that defendant was not required to run its trains at a low rate of speed, as to one who owned stock and allowed it to range in the vicinity of the track, an instruction that it was not negligence to run the train at 50 or 55 miles an hour was properly refused. *St. Louis & S. F. Ry. Co. v. Carlisle (Ark.)*, 462.

Whether engineer had time to sound stock alarm after discovering cow, was a question for jury, notwithstanding his statement that he did not have sufficient time. *St. Louis, I. M. & S. Ry. Co. v. Kimberlain (Ark.)*, 479.

STOP, LOOK AND LISTEN.

See CROSSINGS.

STOPPING CARS.

See STREET RAILWAYS.

STOPPING CARS TO LET OFF PASSENGERS.

See CARRIERS OF PASSENGERS.

STOPPING PLACES.

See CARRIERS OF PASSENGERS; STATIONS AND DEPOTS.

STOPPING TRAINS AT INTERSECTIONS.

See CROSSINGS.

STREET ACROSS RAILROAD.

See EMINENT DOMAIN.

STREET RAILWAYS.

See CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; ELEVATED RAILWAYS; LIENS; STOCK, INJURIES TO.

Acceptance or agreement of street railway company not necessary to give binding force to ordinance prescribing certain precautions to be observed by motormen to avoid collisions with other vehicles. *Sluder v. St. Louis Transit Co. (Mo.)*, 293.

Breach of requirements of ordinance prescribing certain precautions to be observed by motormen to avoid collisions with other vehicles amounts to negligence, for the results of which a street railway company may be liable to an individual. *Sluder v. St. Louis Transit Co. (Mo.)*, 293.

Care required in driving vehicle across street railway tracks. *Riley v. Shreveport Traction Co. (La.)*, 785.

City could not invoke protection of contract clause of Federal constitution against abrogation by Mass. Laws 1898, chap. 578, with consent of street railway, of the provisions of a contract between that company and the city with reference to paving the streets through which the company was thereby granted the right to extend its tracks, and the substitution which that statute makes of another and different method for paving and repairing such streets. *Worcester v. Worcester Con. St. Ry. Co., etc. (U. S.)*, 286.

Conditional sale of rails to street railway company, effect on rights of vendor of laying rails in track on land in which vendee railway company has no interest. *Lorain Steel Co. v. Norfolk & B. St. Ry. Co. (Mass.)*, 718.

Conditional sale of rolling stock, application of Mass. St. 1894, p. 355, c. 326, requiring sale to be recorded in order to be valid against subsequent bona fide purchaser. *Lorain Steel Co. v. Norfolk & B. St. Ry. Co. (Mass.)*, 718.

Conduct of motorman in failing to stop car on seeing wagon approaching track in such manner that driver could see car did not raise issue of gross negligence. *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 838.

Contributory Negligence.

Driver of vehicle which collided with street car was guilty of. *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 838.

In being on street car track will not prevent recovery for any injury which could have been prevented by ordinary care after discovery of plaintiff's peril. *Rapp v. St. Louis Transit Co. (Mo.)*, 419.

In driving other vehicle across street diagonally in direction electric car was coming; the result being a head-on collision. *Riley v. Shreveport Traction Co. (La.)*, 785.

Not negligence, as matter of law, to drive on left-hand side of street. *Wood v. Boston Elevated Ry. Co. (Mass.)*, 475.

Person in vehicle, driven by livery stable driver, whose habits were unknown to him, was not guilty of, where his first knowledge of danger was when, looking through the window of the carriage, he saw a street car bearing down on him. *Sluder v. St. Louis Transit Co. (Mo.)*, 293.

Question for jury in action for injuries to person in a collision between car and another vehicle. *Rapp v. St. Louis Transit Co. (Mo.)*, 419.

STREET RAILWAYS—Continued.

Defendant was not prejudiced by refusal to charge that, if the sole cause of the collision between its car and another vehicle was the negligent manner in which the horses were driven, defendant was not liable, as other instructions fully explained to the jury the effect of contributory negligence and the care required of those in charge of the car. *Chicago Union Traction Co. v. Leach* (Ill.), 220.

Driver's testimony in regard to asserted impediments of the track which prevented him from hastily crossing was not sustained by allegations of his petition nor by weight of testimony. *Riley v. Shreveport Traction Co.* (La.), 785.

Evidence.

Admission of opinion of nonexpert as to speed of car which collided with his vehicle was not reversible error. *Sluder v. St. Louis Transit Co.* (Mo.), 293.

In action for injuries to one whose vehicle was run down by street car, it was proper to permit him to testify as to the rate of speed at which the car was running, such testimony not being given as an expert. *Sluder v. St. Louis Transit Co.* (Mo.), 293.

Fact that car runs quite a distance after accident is not always conclusive that there was negligence on part of motorman. *Riley v. Shreveport Traction Co.* (La.), 785.

Fact that car was not brought to full stop within as short a distance as the evidence shows it is possible to bring such a car to full stop is insignificant, where, even if it had been done, the fatal result would not have been avoided. *Miller v. St. Charles St. R. Co.* (La.), 460.

Fact that street car which collided with mule was not being run faster than five or six miles an hour does not show, as matter of law, that the motorman was not guilty of a willful or wanton wrong in striking the mule. *Montgomery St. Ry. v. Rice* (Ala.), 499.

Imputed negligence, collision between street car and other vehicle, liability of railroad not affected by fact that driver of vehicle in which plaintiff was riding was negligent in turning across track. *Chicago Union Traction Co. v. Leach* (Ill.), 220.

Instructions, taken together, properly presented the issues of negligence and contributory negligence, in action for injuries to person in a collision between his vehicle and street car. *Rapp v. St. Louis Transit Co.* (Mo.), 419.

It was proper to refuse to require plaintiff to elect whether he would stand on his allegations as to general negligence or on allegations as to failure of motorman to comply with ordinance requiring him to keep lookout for vehicle and persons. *Rapp v. St. Louis Transit Co.* (Mo.), 419.

Negligence question for jury in action for injuries to person in a collision between car and another vehicle. *Rapp v. St. Louis Transit Co.* (Mo.), 419.

Ordinance prescribing certain precautions to be observed by motormen to avoid collisions with other vehicles is not void on the ground that it exacts a higher degree of diligence and care than the common-law rule of ordinary care. *Sluder v. St. Louis Transit Co.* (Mo.), 293.

Petition was not open to objection that it combined in one count cause of action ex contractu and one ex delicto, in action for personal injuries in a collision between street car and plaintiff's vehicle. *Rapp v. St. Louis Transit Co.* (Mo.), 419.

Power of city to permit one street railway to cross the right of way of another, under Mo. Const. art. 12, § 20. *St. Louis & S. Ry. Co. v. Lindell Ry. Co.* (Mo.), 281.

STREET RAILWAYS—Continued.

Refusal of request for instructions to the effect that motorman was not obliged to know that driver of wagon would leave place of safety beside the track and turn across track, until he did so turn, was, because of instruction given for plaintiff, erroneous. *Hollingsead v. Camden & Suburban Ry. Co. (N. J.)*, 797.

Right of motorman to presume that driver of another vehicle will use his senses. *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 838.

Sufficiency of evidence that street across company's right of way had become a public highway, although it had not been dedicated by the railroad as a part of the street. *St. Louis & S. Ry. Co. v. Lindell Ry. Co. (Mo.)*, 281.

Validity of ordinance prescribing certain precautions to be observed by motormen to avoid collisions with vehicles. *Sluder v. St. Louis Transit Co. (Mo.)*, 293.

STREETS AND HIGHWAYS.

See CROSSINGS; STOCK, INJURIES TO; STREET RAILWAYS.

STRIKES.

See CARRIERS OF FREIGHT.

STRUCTURES NEAR TRACK.

See CARRIERS OF PASSENGERS; FELLOW SERVANTS; MASTER AND SERVANT.

SUBSEQUENT PRECAUTIONS.

See STOCK, INJURIES TO.

SUBSEQUENT REPAIRS.

See STOCK, INJURIES TO.

SUDDEN STARTING OF TRAIN.

See MASTER AND SERVANT.

SUPERIOR SERVANT LIMITATION OF FELLOW-SERVANT RULE.

See FELLOW SERVANTS.

SWITCHES.

See CARRIERS OF PASSENGERS.

SWITCHING.

See FELLOW SERVANTS; MASTER AND SERVANT.

TAX ASSESSMENT BLANKS.

See EMINENT DOMAIN.

TAXATION.

See EMINENT DOMAIN; LOCAL ASSESSMENTS.

TEAMS.

See ACCIDENTS ON TRACK; CARRIERS OF FREIGHT; CARRIERS OF GOODS; FRIGHTENING TEAMS; STOCK, INJURIES TO; STREET RAILWAYS.

TEMPORARY PLATFORMS.

See MASTER AND SERVANT.

UNLAWFULLY AT LARGE.

See STOCK, INJURIES TO.

UNLIGHTED PLATFORMS.

See CARRIERS OF PASSENGERS.

UNLOADING.

See CARRIERS OF FREIGHT.

UNLOADING CARS.

See RAILROADS IN STREETS.

USAGE AND CUSTOM.

See MASTER AND SERVANT.

VALUATION.

See CARRIERS OF GOODS; CARRIERS OF LIVE STOCK.

VALUATION OF PROPERTY.

See EMINENT DOMAIN.

VALUE, FAILURE TO CONTROVERT.

See STOCK, INJURIES TO.

VALUE OF LAND.

See EMINENT DOMAIN; INJURIES TO PROPERTY;
WATER AND WATERCOURSES.

VARIANCE.

See MASTER AND SERVANT.

VENUE.

See DEATH BY WRONGFUL ACT.

VICE PRINCIPALS.

See FELLOW SERVANTS.

VISUAL POWERS.

See ACCIDENTS ON TRACK.

WAITING ROOMS.

See CARRIERS OF PASSENGERS.

WANTONNESS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; NEGLIGENCE; STREET RAILWAYS.

WAREHOUSEMEN.

See CARRIERS OF GOODS.

Mont. Civ. Code, § 393 (25), providing that a corporation may be founded for the transaction of any commercial business, authorizes a corporation for warehousing goods for shipment. Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.), 207.

Railroad not relieved from liability for burning of goods in warehouse because owners are stockholders in warehouse company, though by its lease from railroad the latter waived all claim for damages from destruction of warehouse by acts of railroad. Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co. (Mont.), 207.

WARNINGS.

See CROSSINGS.

WATCH BOX.

See FELLOW SERVANTS.

WATER AND WATERCOURSES.

See BRIDGES.

Damages.

In action for injury to land from overflow resulting from construction of trestle, it was error to admit evidence as to the value of the land before the construction of the trestle, though other witnesses had testified that the value of the land was the same just before the flood as it was just before the construction of the trestle. *San Antonio & A. P. Ry. Co. v. Kiersey* (Tex.), 10.

Measure of damages for injury to land resulting from construction of trestle over bayou. *San Antonio & A. P. Ry. Co. v. Kiersey* (Tex.), 10.

Prior overflows, evidence of when computing damages. *San Antonio & A. P. Ry. Co. v. Kiersey* (Tex.), 10.

Liability for injury to land from overflow resulting from construction of trestle, error, on account of misleading instructions, to refuse special instruction that if the damages would have occurred had the trestle not been constructed, plaintiff could not recover. *San Antonio & A. P. Ry. Co. v. Kiersey* (Tex.), 10.

Overflow from construction of trestle over bayou, negligence distinguished from act of God. *San Antonio & A. P. Ry. Co. v. Kiersey* (Tex.), 10.

WEIGHT OF EVIDENCE.

See FIRES SET BY LOCOMOTIVES.

WHO ARE EMPLOYEES.

See MASTER AND SERVANT; CARRIERS OF PASSENGERS; CHILDREN.

WHO ARE TRESPASSERS.

See CHILDREN; TRESPASSERS.

WIFE'S EARNINGS.

See PERSONAL INJURIES.

WILLFUL CONTRIBUTORY NEGLIGENCE.

See CROSSINGS.

WILLFULNESS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; NEGLIGENCE; STREET RAILWAYS.

WILLFUL TORTS OF SERVANTS.

See MASTER AND SERVANT; STATIONS AND DEPOTS.

WITNESSES.

See APPEAL.

Refusal of court to permit inquiries of a witness as to the relation of attorney and client between the witness and an attorney for plaintiff, to show bias against defendant, not an abuse of discretion, in a negligence case. *Birmingham Southern Ry. Co. v. Lintner* (Ala.), 225.

WORKING ON TRACK.

See STOCK, INJURIES TO.

WRONGFUL DEATH.

See DEATH BY WRONGFUL ACT.

WRONGFULLY AT LARGE.

See STOCK, INJURIES TO.

WRONG TICKETS.

See CARRIERS OF PASSENGERS.

WRONG TRAIN.

See CARRIERS OF PASSENGERS.

YARD RULES.

See MASTER AND SERVANT.

YARDS.

See LICENSEES; MASTER AND SERVANT.



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